



California Fair Political Practices Commission

September 1, 1992

Jerry J. Levander
6250 Selma Ave., Suite 1294
Los Angeles, CA 90028

Re: Your Request for Advice
Our File No. A-92-565

Dear Mr. Levander:

This letter is in response to your request for advice regarding application of the revolving door provisions of the Political Reform Act (the "Act").¹

QUESTION

Under the provisions of the Act, may you accept employment with the Yerba Buena Water Company, a public utility water corporation, for the purpose of assisting the utility to process an application before the Public Utilities Commission seeking a certificate of public convenience and necessity to extend its service area?

CONCLUSION

The utility filed an application seeking a certificate of public convenience and necessity to extend its service area in 1988. This application was submitted for your consideration as an administrative law judge for the Public Utilities Commission. The application was denied due to a technicality. Accordingly, the new application is deemed to be the same proceeding and you may not represent the interests of the utility before the Public Utilities Commission in this matter.

¹ Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

FACTS

In 1987, the Yerba Buena Water Company, a public utility water corporation, filed Application No. 87-08-048 with the California Public Utilities Commission seeking authority to transfer ownership of the utility and for a certificate of public convenience and necessity to extend its service area.

As an administrative law judge for the Public Utilities Commission, you were assigned to process that application. Your duties included drafting the final order which was signed by the Commission as Decision No. 88-03-052. That decision authorized the ownership transfer. The requested certificate to extend the utility's service area was denied without prejudice because the utility had failed to provide the required environmental assessment in a timely fashion.

In April, 1990, the utility filed its new Application No 90-04-010 seeking a certificate of public convenience and necessity to extend service to a portion of the previously requested service area. That application was amended on May 5, 1992.

You retired from state service on March 1, 1990. However, the Public Utilities Commission engaged your services as an administrative law judge on a consulting basis. This appointment terminated on June 30, 1990. You did not work on processing Application No. 90-04-010 for the Public Utilities Commission.

The utility wishes to employ your services to assist the utility in processing its application before the Public Utilities Commission. The proposed scope of employment is as follows:

1. Consult with and advise the applicant on its proposal.
2. Represent the applicant in discussions with the Public Utilities Commission staff to:
 - a. Ascertain any areas of dispute between staff and applicant;
 - b. Determine the nature of any further information requested by staff;
 - c. Cause the preparation of such information.
3. If staff objections are resolved, request staff to inform the assigned administrative law judge that staff does not object to the granting of the application. This would be done on an ex parte basis if no other matters require a hearing.
4. If the assigned administrative law judge determines that a hearing is necessary, represent and/or testify for the applicant at the hearing.

ANALYSIS

The provisions of the Act which apply to former state administrative officers who subsequently work in the private sector are Sections 87400 through 87405. The basic prohibition is found in Section 87401, which provides as follows:

No former state administrative official, after the termination of his or her employment or term of office, shall for compensation act as agent or attorney for, or otherwise represent, any other person (other than the State of California) before any court or state administrative agency or any officer or employee thereof by making any formal or informal appearance, or by making any oral or written communication with the intent to influence, in connection with any judicial, quasi-judicial or other proceeding if both of the following apply:

(a) The State of California is a party or has a direct and substantial interest.

(b) The proceeding is one in which the former state administrative official participated.
(Emphasis added.)

The above restrictions are expanded in Section 87402, wherein former state officials are prohibited from assisting others in such proceedings as are outlined above. Section 87402 states the following:

No former state administrative official, after the termination of his or her employment or term of office shall for compensation aid, advise, counsel, consult or assist in representing any other person (except the State of California) in any proceeding in which the official would be prohibited from appearing under Section 87401.

A state administrative official is defined by Section 87400(b) as the following:

"State administrative official" means every member, officer, employee or consultant of a state administrative agency who as part of his or her official responsibilities engages in any judicial, quasi-judicial or other proceeding in other than a purely clerical, secretarial or ministerial capacity. (Emphasis added.)

As a former employee and consultant for the Public Utilities Commission, you fall within the definition of state administrative official. Therefore, you may not participate in any proceeding in which the State of California is a party or in which the state has a direct and substantial interest if you participated in the same proceeding as a state administrative official.

"Proceeding" and "participated" are defined in Section 87400(c) and (d) as the following:

(c) "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, including but not limited to any proceeding governed by Chapter 5 (commencing with Section 11500) of Division 3 of Title 2 of the Government Code.

(d) "Participated" means to have taken part personally and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation or use of confidential information as an officer or employee, but excluding approval, disapproval or rendering of legal advisory opinions to departmental or agency staff which do not involve a specific party or parties.

Please note that it is the specific proceeding, rather than the type of proceeding, that is the subject of the restriction. In other words, if you were involved in approving or disapproving a particular application while serving as an administrative law judge for the Public Utilities Commission, you would be enjoined from participating in any proceeding involving that same application while representing a private party. (Sanford Advice Letter, No. A-85-182.)

The above does not mean that "proceeding" is defined narrowly, however. For example, we have previously advised that the Fair Political Practices Commission interprets the word "proceeding" to mean a specific permit application, including all the procedural stages involved in the application. However, whenever both the same specific parties and issues are involved in two permit applications, the two applications constitute only one proceeding. When a permit application is withdrawn because it fails to satisfy some technical requirement, and a new permit application is submitted correcting the technical defect, the two applications would be considered part of only one proceeding. (Galanter Advice Letter, No. 82-079.)

The new application filed by the utility with the Public Utilities Commission concerns the same subject matter and the same issues as the application submitted for your consideration as an administrative law judge in 1988. At that time, the application was denied because the utility had failed to provide the required

environmental assessment. Accordingly, the two applications would be considered part of only one proceeding. Thus, you may not represent the utility in this matter before the Public Utilities Commission.

Section 87406

In 1990, the Legislature enacted a statute imposing additional "revolving door" restrictions on state officials. The provisions of this law, which are applicable to state agency officials, are contained in Section 87406(d)(1), which states as follows:

No designated employee of a state administrative agency, any officer, employee, or consultant of a state administrative agency who holds a position which entails the making, or participation in the making, of decisions which may foreseeably have a material effect on any financial interest, and no member of a state administrative agency, for a period of one year after leaving office or employment, shall, for compensation, act as agent or attorney for, or otherwise represent, any other person, by making any formal or informal appearance, or by making any oral or written communication, before any state administrative agency, or officer or employee thereof, for which he or she worked or represented during the 12 months before leaving office or employment, if the appearance or communication is made for the purpose of influencing administrative 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. For purposes of this paragraph, an appearance before a state administrative agency does not include an appearance in a court of law, before an administrative law judge, or before the Worker's Compensation Appeals board. The prohibition of this paragraph shall only apply to designated employees employed by a state administrative agency on or after January 7, 1991. (Emphasis added.)

Thus, Section 87406(d)(1) prohibits you from appearing before or communicating with the Public Utilities Commission to influence action on "administrative action" (i.e., regulations),² permits, licenses, grants, contracts, or the sale or purchase of goods or property. The prohibition extends for one year after leaving

² "Administrative action" is defined in Section 82002 and Regulation 18202. It includes the adoption, amendment or repeal or regulations and other quasi-legislative action proposed by a state agency. Regulation 18202 clarifies that proceedings such as advisory rulings and enforcement actions are not considered "administrative action."

state office or employment. The prohibition does not prevent you from communicating with the Legislature or with other state agencies.

However, under Section 87406(d)(1), representation must be for compensation. If you represent a client and do not receive any compensation, this section is not applicable. Furthermore, an appearance before an administrative law judge is specifically excluded. If you represent a client before an administrative law judge, the restrictions of this section do not apply.

Your employment with the Public Utilities Commission first as an employee and then briefly as a consultant terminated on June 30, 1990. Thus, the provisions of Section 87406 are not applicable to you. However, as stated above, the utility's new application is deemed to constitute the same proceeding as the previous application in which you participated as an administrative law judge. Accordingly, you may not represent the utility in this proceeding.

We trust this letter adequately responds to your inquiry. Should you have any further questions regarding this matter, do not hesitate to call me at (916) 322-5901.³

Sincerely,

Scott Hallabrin
Acting General Counsel



By: Blanca M. Breeze
Counsel, Legal Division

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³ Copies of Commission regulations and Opinions are available in many law libraries. Alternatively, copies of these materials and Commission advice letters may be obtained from the Commission at a cost of 10¢ per page.