



California Fair Political Practices Commission

December 30, 1993

Michael R. Monagan
Board Member
California Occupational Safety and Health Appeals Board
1006 Fourth Street, 4th Floor
Sacramento, CA 95814-3370

Re: Your Request for Advice
Our File No. A-93-473

Dear Mr. Monagan:

This is in reply to your request for advice concerning the "revolving door" provisions of the Political Reform Act (the "Act").¹

QUESTIONS

You are a board member with the State of California Occupational Safety and Health Appeals Board. You plan to leave your position, effective January 6, 1994. What, if any, restrictions apply to your representation of clients before:

1. The California Occupational Safety and Health Standards Board ("Cal-OSHA Standards Board")?
2. The Department of Industrial Relations' Division of Occupational Safety and Health ("Division")?
3. The California Occupational Safety and Health Appeals Board ("Cal-OSHA Appeals Board")?

CONCLUSIONS

1. and 2. You may represent, for compensation, any client before the Cal-OSHA Standards Board or the Division so long as the matter in which you provide representation is not part of a proceeding in which you participated during your employment with the Cal-OSHA Appeals Board.

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, Sections 18000-18954.

3. You may represent clients before the Cal-OSHA Appeals Board only under the following conditions:

a. You may not, for a one year period after you leave employment with the Cal-OSHA Appeals Board, for compensation, make any appearance before or communication to the Cal-OSHA Appeals Board, or any officer or employee thereof, for the purpose of influencing any Appeals Board regulation.² You may represent a party in an administrative hearing before an administrative law judge from the Cal-OSHA Appeals Board. This would include hearings, preliminary hearings, settlement negotiations and other formal matters before the administrative law judge in which all parties are present, and a transcript, recording or other record of your contact with Cal-OSHA Appeals Board personnel is made.

b. You may not, for compensation, represent any client before the Cal-OSHA Appeals Board in any proceeding in which you participated during your employment with the Cal-OSHA Appeals Board.

FACTS

You have served as the labor member of the Cal-OSHA Appeals Board since 1984. The Cal-OSHA Appeals Board is a part of the California Department of Industrial Relations. Also within the Department of Industrial Relations are the Cal-OSHA Standards Board and the Department's Division of Occupational Safety and Health.

As we understand the relationship of these agencies, the Cal-OSHA Standards Board promulgates the worker safety standards for California employers, the Division prosecutes employer violations of the standards and the Cal-OSHA Appeals Board, which employs administrative law judges, hears and decides cases prosecuted by the Division. In your capacity as a board member of the Cal-OSHA Appeals Board, you hear appeals of decisions by administrative law judges on cases prosecuted exclusively by the Division.

You plan to resign your position at the Cal-OSHA Appeals Board effective January 6, 1994. At that time, you plan to work for a consultant group which will represent clients before various state and local agencies.

² You also may not, for a period of one year, appear before or communicate with the Appeals Board, or any employee thereof, for the purpose of influencing any legislative action or 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.

ANALYSIS

One-Year Ban From Appearing Before or
Communicating with Former Agencies

Effective January 1, 1994, Government Code Section 87406(d) states:

(1) 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 or legislative action For purposes of this paragraph an appearance before a state administrative agency does not include an appearance ... before an administrative law judge³

The Cal-OSHA Appeals Board is an administrative agency (see Section 87400(a)), and you are a member of that agency. Therefore, you are prohibited for a period of one year after leaving office, for compensation, from representing any person by making an appearance before or communication to the Cal-OSHA Appeals Board, or an officer or employee thereof, if the appearance or communication is made for the purpose of:

- (1) influencing administrative action⁴; or
- (2) influencing legislative action⁵; or

³ Section 87406 was amended effective January 1, 1994, to add influencing an agency's "legislative action" to the one year prohibition. If you vacate office prior to January 1, 1994, the "legislative action" prohibition would not be applicable to you.

⁴ Section 82002 defines "administrative action" to mean "the proposal, drafting, development, consideration, amendment, enactment or defeat by any state agency of any rule, regulation or other action in any rate-making proceeding or any quasi-legislative proceeding, which shall include any proceeding governed by Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2."

⁵ Section 82037 defines "legislative action" to mean "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. "

(3) 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.

Due to the almost unique organization of Cal-OSHA, in which the enforcement, standards promulgation and appeals process are delegated by statute to three distinct agencies, it is our opinion that these restrictions do not apply to you in making appearances before or communications with the Cal-OSHA Standards Board or the Division. While we recognize that these entities are within the same department (the Department of Industrial Relations), they function as separate entities. They are, in effect, separate departments unto themselves. Therefore, your "state administrative agency" for purposes of Section 87406(d) is the Cal-OSHA Appeals Board and does not include any other component of the Cal-OSHA program.⁶

The revolving door provisions of Section 87406(d) specifically exempt an appearance before an administrative law judge from the actions that are prohibited for one year after employment by a state agency. We interpret this exception to apply only to hearings, preliminary hearings, settlement negotiations and other formal matters before the Cal-OSHA Appeals Board administrative law judge in which all parties are present and a transcript, recording or other record of your contact with Cal-OSHA Appeals Board personnel is made.⁷ Only then can you participate in such a matter during the one-year period following your resignation.

Permanent Ban from Participation in Specific Proceedings

Sections 87400-87404 generally prohibit former state administrative officials from being compensated to represent or aid in the representation of another person before any court or state administrative agency in connection with any proceeding in which the official participated while employed by the State.

Specifically, Section 87401 states:

No former state administrative official, after the termination of his or her employment or term of office,

⁶ Please note that this analysis only applies to the three entities under the Department of Industrial Relations discussed above. Other parts of the Department, such as its executive office, would probably be considered part of your "state administrative agency" because we presume it ultimately controls the personnel and other activities of the Cal-OSHA Appeals Board not related to deciding employer violations.

⁷ In other words, the exception permitting you to appear before an Appeals Board administrative law judge does not permit you to engage in ex parte contacts with the administrative law judge or in direct contacts with other Cal-OSHA Appeals Board personnel concerning the merits of a particular case. (See Albino Advice Letter, No. A-92-470.)

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.

Furthermore, Section 87402 states:

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.

Therefore, to the extent that you, in your capacity as a Cal-OSHA Appeals Board member, participated⁸ in particular board proceedings,⁹ you cannot, after leaving the Board, represent or aid in the representation of clients in connection with any of these proceedings.

To the extent that the proceedings are before the Cal-OSHA Standards Board or the Division, or any court or other state administrative agency, you likewise cannot represent clients in those proceedings. What constitutes the same or different "proceeding" for purposes of these restrictions must be analyzed

⁸ Section 87400(d) defines "participated" to mean "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.

⁹ Section 87400(c) includes in the agency proceedings covered by these restrictions the following: "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.

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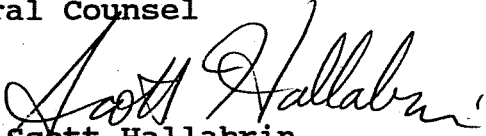
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on a case-by-case basis. Therefore, we cannot provide you with more detail on this question until there is a specific proceeding to analyze.

I hope this letter has been of assistance. Should you have further questions, please contact me at (916) 322-5901.

Sincerely,

Steven G. Churchwell
General Counsel


By: Scott Hallabrin
Assistant General Counsel

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