

RAVI MEHTA  
CHAIRMAN



## FAIR POLITICAL PRACTICES COMMISSION

June 7, 1997

The Honorable James Weil  
Administrative Law Judge  
California Public Utilities Commission  
925 Patricia Way  
San Rafael, California 94903

**Re: Your Request for Advice  
Our File No. A-97-247**

Dear Judge Weil:

This letter is a response to your request for advice regarding the post-employment provisions of the Political Reform Act (the "Act").<sup>1</sup>

### QUESTIONS

1. May you give expert testimony under the exemption in Section 87403(a) in CPUC proceedings in which you have participated as an ALJ if you receive compensation pursuant to Article 5 of the Public Utilities Code and where your testimony is voluntary and meant to influence the proceedings?

2. Does the one year restriction of Section 87406(d) begin on the day you leave the agency, but still receive compensation because you are taking vacation days, or on the formal separation date?

3. Does the exemption in Section 87406(d)(1) regarding appearances before an ALJ apply to: (a) discovery requests made to CPUC staff; (b) answers to CPUC staff in response to their discovery requests; (c) preparation of written testimony that will later be presented before an ALJ; (d) procedural discussions with CPUC staff; (e) settlement negotiations with CPUC staff; (f) noticed public settlement conferences that might be attended by CPUC staff; or (g) other pleadings served on the ALJ and all parties, including CPUC staff -- for example, motions, petitions, and formal written comments?

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<sup>1</sup> Government Code sections 81000 - 91014. Commission regulations appear at title 2, sections 18109 - 18995, of the California Code of Regulations.

4. If you act on behalf of a consumer advocacy organization during the one year period specified in Section 87406(d), can the CPUC award you intervener compensation pursuant to Article 5 of the Public Utilities Code for time spent on activities eligible for the "before an ALJ" exemption when on behalf of the same client you performed activities that you could not receive compensation under Section 87406(d)?

5. Section 87406(d) requires that for one year you must not, for compensation, act as agent or attorney for, or otherwise represent, any other person for the purpose of influencing administrative action. Can you act in this way on behalf of yourself as an individual, for compensation, specifically intending to seek an award of intervener compensation under the Public Utilities Code?

6. Does Section 87406(d) prevent your agent or representative from partaking for compensation in activities which you could not perform for compensation under Section 87406(d)?

7. Does Section 87407 prevent you, on your own time, from creating a consumer advocacy organization before you leave state service where you plan to acquire clients and sponsors for once you leave state service?

### CONCLUSIONS

1. No. Section 87403(a) is a very narrow exemption which does not cover expert testimony voluntarily given in an attempt to influence a proceeding which does not convey information known particularly to the public official.

2. The one year restriction of Section 87406(d) begins on the day you formally separate from the agency.

3. We interpret this exception to apply only to hearings, preliminary hearings, settlement negotiations and other formal matters before an ALJ of the CPUC in which all parties are present and a transcript, recording or other record of your contact with the CPUC personnel is made.

4. No. For example, if you testify before an ALJ (exemption applies) and have a private meeting with a CPUC Commissioner regarding the same proceeding (exemption does not apply), but do not seek intervener compensation for time spent in the private meeting, the meeting prevents you from accepting an award of intervener compensation for time spent testifying before the ALJ.

5. No. Your activities would be in connection with your consumer advocacy organization. You may not on behalf of your consumer advocacy organization request an award for compensation from the CPUC for a period of one year after leaving state service.

6. The ban of Section 87406(d) does not apply to paid or unpaid assistance you render to a third person who subsequently appears before or communicates with the CPUC.

7. No. You may set up the nuts and bolts of the organization like registering a name, setting up an office, phone, etc.

### FACTS

You are now employed as an administrative law judge (ALJ) at the California Public Utilities Commission (CPUC) in San Francisco. You are not an attorney. You are a "state administrative official" as defined in Section 87400(b) and you are a "designated employee," under Section 87406(d)(1). You file annual statements of economic interest with the Fair Political Practices Commission.

You have given notice of resignation from the CPUC, intending to separate from state service effective May 31, 1997. After leaving the CPUC, you plan to continue your career in the energy industry by representing utility customers before the CPUC, possibly as a consultant, expert witness, or consumer advocate. You have made no such negotiation or arrangement, but you do contemplate forming a consumer advocacy organization to participate in CPUC proceedings. In order to form this organization, you plan on registering a name, renting a post office box, etc. You will not recruit members or deal with any person that might be a member or sponsor of the organization until you leave state service. The organization will be a "one man show." You would be representing the interests of these clients. However, these members or sponsors would pay you only nominal amounts. The bulk of compensation for your work would be from parties to CPUC proceedings or by awards of intervener compensation from the CPUC pursuant to Public Utilities Code Sections 1801 through 1812.

### ANALYSIS

Your letter concerns post-employment issues, what are colloquially known as the "revolving door" prohibition and the permanent ban on "switching sides." The Act places certain restrictions on individuals who have recently left state service and who wish to use the expertise and relationships they developed at their former agency for compensation by third persons.

#### **A. The permanent ban on "switching sides."**

Public officials who leave state service are subject to two types of post-employment restrictions under the Act. The first is a permanent prohibition on influencing any judicial or other proceeding in which the official participated while in state service. (Sections 87401,

87402.) In other words, a public official may never “switch sides” in a proceeding<sup>2</sup> after leaving state service. You accept that you are a “state administrative official” as defined in Section 87400(b) and subject to the restrictions of Sections 87401 and 87402. However, you are requesting advice on the exemption in Section 87403(a) which provides that the prohibitions contained in Sections 87401 and 87402 shall not apply:

“To prevent a former state administrative official from making or providing a statement, which is based on the former state administrative official’s own special knowledge in the particular area that is the subject of the statement, provided that no compensation is thereby received other than that regularly provided for by law or regulation for witnesses. . .”

Specifically, you ask whether an award of compensation triggered by the Public Utilities Code Sections 1801-1812 for the testimony of expert witnesses is compensation regularly provided by law for witnesses which would allow you to testify in CPUC proceedings in which you had participated as an ALJ.

Public Utilities Code Section 1803 provides that the CPUC shall award reasonable expert witness fees to any “customer” who complies with Article 5. “Customer” is defined generally as any participant who represents either consumers of public utilities or a consumer advocacy group. If you were awarded expert witness fees pursuant to Article 5 of the CPUC, you could be within the exemption of Section 87403 because it is compensation regularly provided for by law for witnesses. However, the type of expert testimony which is permitted under this exemption is very narrow. The exemption does not cover testimony voluntarily given by an ex-state administrative official with the intent to influence a proceeding when the information provided is not information known particularly to the ex-state administrative official. Therefore, this exception does not apply to you whether or not you accept compensation.

**B. The one-year ban.**

The second post-employment restriction is a one year prohibition on making any appearance before your former agency for the purpose of influencing certain kinds of agency actions. Specifically, Section 87406(d)(1) of the Act, in pertinent part, provides that:

“No designated employee 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,

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<sup>2</sup> “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.” (Section 87400(c).)

all parties, including CPUC staff -- for example, motions, petitions, and formal written comments. We find that the exception for appearances before an administrative law judge does not apply to subdivisions (a) - (e). Further, we do not make a determination as to subdivisions (f) and (g) and leave it to you to apply the criteria from the *Monagan* Advice Letter, *supra*, provided above.<sup>4</sup>

Once you leave state service it is your intention to start a consumer advocacy organization which would become intervenors in proceedings before the CPUC. Under Article 5 of the Public Utilities Code, intervenors may seek an award of compensation for fees and expenses when they make a substantial contribution to the proceedings of the CPUC. You would like to ask for compensation from the CPUC on behalf of your consumer advocacy organization for those activities which you may accept compensation for under Section 87406(d) while partaking in other activities that you could not be compensated for under Section 87406(d).

You admit that if you were being compensated by a private party to influence administrative action that you could not escape the prohibitions of Section 87406(d) by charging your client for some activities, but not others. For instance, you could not charge a client to perform activities exempted from the prohibitions of Section 87406(d) while influencing the process by partaking in activities that you could not receive compensation for under Section 87406(d). You may not be compensated for a prohibited activity, but you are not restricted if you are not compensated for your actions. Under your facts, it appears the activities are interlinked, as it is your activities on behalf of a client that enable you to be compensated. The term "for compensation" is interpreted broadly and construed to prevent individuals from escaping the limitations of the "revolving door" prohibitions. Therefore, you may not request an award for compensation for activities which are exempted from the prohibitions of Section 87406(d) and partake in activities in connection with the same proceedings for which you may not receive compensation pursuant to Section 87406(d).

Section 87406(d) only applies to representation for compensation in connection with representation of another person. (*Sloat* Advice Letter, A-97-076, *Simonian* Advice Letter, No. I-94-001.) You have stated that your consumer advocacy organization would be a "one man show," but that it would have clients whose interests you would represent. The term "person" is not specifically defined in the "revolving door" sections. The term "person" as defined in Section 82047 includes any "individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, company, association, committee, and any other group of persons acting in concert." We have found no history by the authors of the revolving door provisions showing an intent to create a separate and distinct definition of "person." (*Michelotti* Advice Letter, No. I-93-102.) This definition has been construed to include public agencies within its scope. (*In re Witt* (1975) 1 FPPC Ops. 1; *Evans* Advice Letter, No. I-86-117.)

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<sup>4</sup> The Commission does not act as the finder of fact in providing advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

Based on this broad definition of "person" and the fact that you will not be representing yourself in proceedings before the CPUC, but rather the consumer advocacy organization, the prohibitions of Section 87406(d) do apply to you. Further, Section 87406(d) would prevent you from requesting an award for compensation under Article 5 of the Public Utilities Code since you would be asking for compensation on behalf of your consumer advocacy organization and not on behalf of yourself as an individual.<sup>5</sup>

We have advised that restrictions on influencing administrative or legislative action do not apply to paid or unpaid assistance rendered to a third person who subsequently appears before or communicates with a former official's agency. Thus, the ban of Section 87406 does not restrict a former official from assisting or advising other attorneys in the official's law firm or clients themselves who might appear before or communicate with the official's former agency regarding a regulation or legislation under consideration. (*Ordos* Advice Letter, No. A-95-052.) Similarly, the ex-employee may use his or her expertise to advise clients on the procedural requirements, plans, or policies of the employee'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.) Therefore, your agent or representative could influence administrative action not exempted under Section 87406(d).

Finally, you ask about the prohibitions of Section 87407 which provides:

"No state administrative official, elected state officer, or designated employee of the Legislature 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."

Specifically, you would like to know whether you may begin to organize your consumer advocacy organization, short of negotiating any arrangement concerning prospective representation. If you do not have any arrangements to represent anyone or are not in negotiations with anyone concerning potential representation, then Section 87407 is not implicated. This is a factual determination the Commission cannot make.

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<sup>5</sup> In the *Caplan* Advice Letter, No. A-95-309, a former state employee of the Department of Rehabilitation was allowed to contract as an individual with the Department of Rehabilitation.

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

Sincerely,

Steven G. Churchwell  
General Counsel

A handwritten signature in black ink, appearing to read "Marte Castaños", with a horizontal line extending from the end of the signature.

By: Marte Castaños  
Staff Counsel, Legal Division

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