

RAVI MEHTA
CHAIRMAN



FAIR POLITICAL PRACTICES COMMISSION

October 21, 1997

William Garcia
7985 Vintage Way
Fair Oaks, California 95628

**Re: Your Request for Advice
Our File No. A-97-445**

Dear Mr. Garcia:

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

QUESTIONS

1. Will the one-year "revolving door" prohibition embodied in Section 87406(d) prevent you from making oral or written contact with the State Department of Veterans Affairs or any of the California State University campuses after leaving your state employment?
2. Will the permanent ban on "switching sides" prevent you from participating in proceedings in which you were personally and substantially involved while you were employed by the Department of Veterans Affairs?

CONCLUSIONS

1. The one-year prohibition embodied in Section 87406(d) prohibits you, for compensation, from acting as an agent or otherwise representing any other person before the Department of Veterans Affairs, or the CSU Monterey Bay campus if you served as a "consultant" within the meaning of the Act for that agency during the 12 months before leaving your state employment.

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

2. The permanent ban prevents you, for compensation, from acting as an agent or otherwise representing any person other than the State of California concerning a proceeding in which you were substantially involved while in state service. The prohibition does not apply to new proceedings.

FACTS

You are a designated employee of the Department of Veterans Affairs ("DVA"). You will be retiring from your state employment as a Supervising Property Agent with the DVA effective December 2, 1997. From August 1992 to November 1996, you were on a "Loaned Executive Assignment" to University Services, Office of the Chancellor, California State University ("CSU"). One of your primary responsibilities was assisting in the refinement of a comprehensive marketing plan and follow-up program to increase California state government and corporate awareness of the vast educational and technological resources available through the 20 campuses of the CSU.

CSU paid you an additional stipend beyond your state salary for approximately the last two years of your assignment. Your loan assignment terminated in November 1996. While on loan to CSU from 1992 to 1996, the DVA remained your employer of record and continued to pay your salary. You made monthly progress reports to DVA and submitted your sick leave and annual leave for approval to DVA.

You conduct a consulting business involving public relations and marketing. In November 1996, your business entered into an agreement to build a CSU Monterey Bay ("CSUMB") presence with California State agencies. The agreement terminated in April 1997. Your contract work culminated in one event, a one-day outreach effort that was held April 25, 1997. Pursuant to our conversation of October 1, 1997, you indicated that your work did not involve decisionmaking or contract development and that your work was strictly limited to public relations and marketing. Upon leaving your state employment in December 1997, you wish to pursue a consultant agreement with CSUMB to represent the entity in establishing contacts and collaborations in marketing the campus.

ANALYSIS

One-Year Ban

As a designated employee of the Department of Veterans Affairs you are subject to the one-year "revolving door" ban of Section 87406. Section 87406(d)(1) of the Act provides in pertinent part:

"No designated employee of a state administrative agency, any officer, employee, or consultant of a state administrative agency who holds a position which entails making, or participation in the making, of decisions which may foreseeably have a material effect on any financial interest, 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 influencing² administrative or legislative action,³ 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."

* * * *

"(e) The prohibitions contained in subdivisions (b), (c), and (d) shall not apply to any individual subject to this section who is or becomes an officer or employee of another state agency, board, or commission if the appearance or

² "Influencing legislative or administrative action" includes influencing by any means, including but not limited to the provision or use of information, statistics, or analyses. (Section 82032.) "Administrative action" is defined in Section 82002 as 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.

³ Section 82037 defines "legislative action" as 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 or her official capacity. "Legislative action" also means the action of the Governor in approving or vetoing a bill.

communication is for the purpose of influencing legislative or administrative action on behalf of the state agency, board, or commission.”⁴

Generally, an officer’s or designated employee’s state administrative agency⁵ means any agency for which he or she worked or represented during the 12 months before leaving office or employment. (*Wright* Advice Letter, No. A-96-277.) In determining which is an official’s state administrative agency within the meaning of Section 87406, we have applied a pyramid concept. (*Monagan* Advice Letter, No. A-93-473.)⁶ Therefore, if the prohibition applies to CSU, it may apply to all 20 campuses.

In determining which agency an employee or officer “worked for or represented,” we have advised that an official did not work for or represent the Governor where he merely participated in the budget process as an advisor. (*Gould* Advice Letter, No. A-97-077.) We have also advised that an employee did not work for or represent regional boards where he did not work with or advise them. (*Grimm* Advice Letter, No. I-96-114.) Another employee did not work for the Governor’s office where he was merely on loan during a brief transition period ending his state employment. (*Wright* Advice Letter, No. A-96-277.)

Under your facts, you will have performed duties in your capacity as a designated employee of the Department of Veterans Affairs. In addition, pursuant to your “Loaned Executive Assignment” you would have worked for or represented CSU for approximately a four-year period. Therefore, you would have worked for or represented both agencies for purposes of Section 87406. However, your assignment with CSU terminated in November 1996, and your last compensation from CSU as a “loaned executive” was also in November of 1996. Therefore, the CSU is not an agency for which you would have worked for or represented during the 12 months before your leaving office or employment, which you indicate is December 2, 1997. The one-year ban will not apply to CSU generally under these facts.

⁴ You have provided no facts indicating that this subdivision would apply to you.

⁵ For purposes of Section 87406, we have advised that “state administrative agency” means every state office, department, division, bureau, board and commission, but does not include the Legislature, the court or any agency in the judicial branch of government. (Section 87400; *Michelotti* Advice Letter, No. I-93-102.)

⁶ In the *Monagan* Advice Letter, the facts were that a statute established three distinct Occupational Safety and Health agencies under the Department of Industrial Relations, each with different duties. We advised that the prohibition was limited to one of those agencies, the former board that employed the official.

However, as a state employee you also worked for or represented CSU Monterey Bay in a private capacity through an agreement with your consulting business.⁷ The question you present is whether you are, nonetheless, covered by the prohibitions of Section 87406. CSU Monterey Bay is clearly a state administrative agency for which you "worked for or represented" during the 12 months before leaving office or employment. The novel aspect to your situation is that you "represented" SCUMB as a private contractor.

We have in the past calculated the 12-month period in the context of a public official's conduct as an employee or officer of a state administrative agency. (*Burroughs* Advice Letter, No. A-97-290; *Gould* Advice Letter, *supra*; *Grimm* Advice Letter, *supra*.) Therefore, arguably the one-year ban does not cover your representation of CSUMB as a private consultant. On the other hand, the apparent intent of Section 87406 generally is to remedy the problem of recent agency "insiders" using the advantages of that recent "insider" status on behalf of their clients. In keeping with this remedial purposes, the Commission staff interprets Section 87406 broadly. (*Marcus* Advice Letter, No. A-96-344; *Tobias* Advice Letter, No. A-96-089.) Therefore, another plausible reading of the statute is that once it is determined that you are an officer or employee subject to Section 87406(d)(1), any agency that you worked for or represented is covered by the prohibition, regardless of your status with that agency at the time. We believe that the language in Section 87406 is broad enough to encompass work or representation personally provided by an officer or employee, and does not expressly exempt compensation received through a business entity as a consultant.

However, we are also of the opinion that the statute contemplates that an individual acted in an employer/employee relationship. Under your facts, we conclude that you did not work for or represent CSUMB for purposes of Section 87406 since it does not appear that you served in a capacity equivalent to that of an employee, consultant, or officer of CSUMB.⁸ Your contract with CSUMB was a short-term contract that culminated in one event, a one-day outreach event. Pursuant to our conversation of October 1, 1997, you indicated that your work did not involve decisionmaking or contract development; it was strictly limited to public relations and marketing.

Consequently, for one year after you leave the Department of Veterans Affairs, you may not, for compensation, act as an agent or representative for any other person before the DVA for the purpose of influencing administrative or legislative action, or any action or proceeding

⁷ As we previously advised you in the *Garcia* Advice Letter, No. A-96-261, it is important to stress that this analysis does not address other state laws outside our jurisdiction which may affect you. (E.g., see Section 1090 et seq., "Incompatible Activities of State officers and Employees.")

⁸ Our conclusion could differ, for example, if you were performing substantially the same duties as an employee. For example, if you served as a "consultant" within the meaning of the Act, CSU Monterey Bay would also be covered by the prohibition. (Regulation 18700, copy enclosed.) The term "public official" is broadly defined in the Act to include every member, officer, employee, and consultant of a state or local government agency. (Section 82048.)

involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property of the DVA. (Section 87406.)

Under Section 87406(d)(1) representation must be for compensation in connection with representation of another person. (*Reames* Advice Letter, No. I-91-289; *Simonian* Advice Letter, No. I-94-001.) 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." This definition of person 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.) Therefore, for example, for one year after leaving state service you could not, for compensation, represent DVA and a private firm in connection with the same contract.

Permanent Ban on "Switching Sides"

Sections 87401 and 87402 provide an additional restriction on the post-governmental employment activity of former public officials that may apply even where Section 87406 does not, or where the one year prohibition in Section 87406 has run. They provide:

"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." (Section 87401.)

"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." (Section 87402.)

The permanent ban of Sections 87401 and 87402 applies only to judicial, quasi-judicial, or other proceedings before any court or state administrative agency in which a former employee participated while at his or her former agency.⁹

Section 87400(c) defines "judicial, quasi-judicial or other proceeding" to include:

“[A]ny 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.” (Emphasis added.)

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).) This covers any proceeding in which any employee has actually participated while at his or her former agency, as well as any proceeding which he or she supervised. (*Brown* Advice Letter, No. A-91-033.) However, Sections 87401 and 87402 do not restrict an ex-employee's ability to participate in *new* proceedings. (*Leslie* Advice Letter, No. I-89-649.)

Under Sections 87400-87402, the prohibition applies if participation is for compensation. The prohibition does not apply if the former official is acting on behalf of another state agency or the State of California. Therefore, we have advised that the provisions of Sections 87401 and 87402 do not prevent a former state administrative official who has left his or her state employment from contracting with other state agencies. (*Webb* Advice Letter, No. A-93-382; *McWhirk* Advice Letter, No. A-89-392; *Walsh* Advice Letter, No. A-90-281.) The permanent restrictions do apply if *another person*, such as a private entity, is represented for compensation in connection with the same proceeding.

As a former public employee, you would be subject to the permanent ban if, as part of your official responsibilities, you participated in any proceeding in other than a purely clerical, secretarial, or ministerial capacity. (Section 87400(b).) We conclude this includes your official duties under the "Loaned Executive Assignment." Therefore, you may not, for compensation, aid, advise, counsel, consult or assist in representing any other person with the intent to influence

⁹ Section 87400(a) expressly defines "state administrative agency" to exclude the Legislature.

the outcome of a proceeding, such as a contract proceeding, in which you participated. (Section 87402.) You would, however, be able to represent a state agency, such as the CSUMB. (*Davidian* Advice Letter, No. A-97-076a.)

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

Sincerely,

Steven G. Churchwell
General Counsel

A handwritten signature in cursive script that reads "Luisa Menchaca".

By: Luisa Menchaca
Senior Staff Counsel, Legal Division

SGC:LM:tls