



## FAIR POLITICAL PRACTICES COMMISSION

December 16, 1997

Rebecca Parker, Ph.D.  
2550 Sycamore Lane #6-H  
Davis, California 95616

**Re: Your Request for Advice**  
**Our File No. A-97-446**

Dear Ms. Parker:

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

### QUESTION

How do the post-employment provisions of the Act affect your potential employment with WestEd, a joint powers agency?

### CONCLUSION

The post-employment restrictions of the Act may affect your employment with WestEd, a local government agency, as described below. Please see the Analysis below.

### FACTS

You are a former interjurisdictional exchange contractor (contract consultant) for the California Department of Education (CDE), assigned to the Migrant Education Office. As a contract consultant you were a "designated employee" for purposes of the CDE conflict of interest code. While you were with the CDE, you were involved in developing contracts with WestEd and other organizations. You left your position with the CDE in August of 1997.

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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.

You are interested in working for WestEd. WestEd is a joint powers agency, with many contracts from different educational agencies, including the United States Department of Education and several offices within the California Department of Education. You have not accepted any positions with WestEd. You are in the talking stages. Your understanding is that you could move into WestEd as a manager and, eventually, into a codirectorship. WestEd has many different projects running now, and it would not be necessary for you to work on any migrant education issues if it is prohibited by the Act.

### ANALYSIS

Your letter concerns post-employment issues, 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<sup>2</sup> 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 and 87402.) In other words, a public official may never “switch sides” in a proceeding after leaving state service. We urge you to take note of Sections 87400-87405 in their entirety. However, we will discuss certain aspects of those sections here.

Sections 87401 and 87402 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.

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<sup>2</sup> In addition, the Act includes a “pre-post employment” restriction on influencing prospective employment while still a state official. (Section 87407.)

(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.)

However, the prohibitions above do not apply if the former official is receiving compensation from another state administrative agency or the State of California. (*Davidian* Advice Letter, No. A-97-076a.) A “state administrative agency” means every state office, department, division, bureau, board and commission, but does not include the Legislature, the courts or any agency in the judicial branch of the government.

The facts do not suggest that WestEd represents the State of California or that WestEd is a state administrative agency. I have enclosed the *Cohen* Advice Letter, No. A-96-090, which found that a joint powers agency was a *local* government agency for purposes of the post-employment restrictions. In addition, for purposes of the conflict of interest laws in the Act, we have advised that a joint powers authority is a local government agency. (*Hogeboom* Advice Letter, No. A-96-172; *Elliot* Advice Letter, No. I-90-197.) Therefore, we find that WestEd is not a state administrative agency and the permanent ban on switching sides may apply to you in certain circumstances if you work for WestEd. The following discussion is meant to give you an overview on the prohibition against “switching sides.”

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. Section 87400(a) expressly defines “state administrative agency” to exclude the Legislature. (*Sanford* Advice Letter, No. A-85-182.) We have also advised that Sections 87401 and 87402 are not limited with respect to development of legislation. (*Witherspoon* Advice Letter, No. A-94-371; *Byrne* Advice Letter, No. A-95-337.)

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, copy enclosed.)

Under Section 87400(c) set forth above, a "proceeding" includes any particular matter involving a specific party or parties in a state administrative agency. A proceeding that is regulatory or general in nature is not a "proceeding" for purposes of Section 87401 since there is no specific party involved. (*Chalfant* Advice Letter, No. A-92-509.) 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. Commission staff has held that you cannot escape the prohibitions of Section 87406 by charging your client for some activities, but not others. (*Weil* Advice Letter, No. A-97-247.) The same rule applies in the context of Sections 87400-87402, unless an exemption set forth in Section 87403 applies. Your facts do not suggest any of these exemptions apply.

#### **B. One-Year Ban (Revolving Door)**

Section 87406(d)(1) of the Act provides, in pertinent part, that no officer or designated employee of a state administrative agency:

"[F]or 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<sup>3</sup> administrative

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<sup>3</sup> "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.

or legislative action,<sup>4</sup> 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.

Similar to the permanent ban on "switching sides," the revolving door prohibitions do not apply to a former designated employee of a state administrative agency if the former employee is acting on behalf of state agency, board, or commission.<sup>5</sup> Again, however, the facts do not suggest that WestEd is a state agency,<sup>6</sup> board, or commission. Therefore, we find that the revolving door prohibitions would apply to you.

Section 87406(d)(1) is applicable to you for one year after you leave your position with the CDE. You may not, for compensation, act as representative or agent for any person before the CDE or any of its subordinate agencies for the purpose of influencing administrative or 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. (Section 87406.)

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<sup>4</sup> 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.

<sup>5</sup> Section 87406(e) provides: "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 communication is for the purpose of influencing legislative or administrative action on behalf of the state agency, board, or commission."

<sup>6</sup> "State Agency" means every state office, department, division, bureau, board and commission, and the Legislature. (Section 82049.)

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 long horizontal flourish extending to the right.

By: Marte Castaños  
Staff Counsel, Legal Division

SGC:MEC:jlw