



## FAIR POLITICAL PRACTICES COMMISSION

February 10, 1998

Joseph R. Symkowick  
Deputy General Counsel  
California Department of Education  
721 Capitol Mall  
Post Office Box 944272  
Sacramento, California 94244-2720

**Re: Your Request for Advice  
Our File No. A-97-621**

Dear Mr. Symkowick:

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

### QUESTIONS

1. Do the post-governmental employment restrictions in Section 87406 apply to an employee "loaned" from the State Department of Education to a local school district as described below?
2. If the previous question is answered in the affirmative, when does the 12 month period specified in Section 87406(d)(1) commence?

### CONCLUSIONS

1. No. Since you have not left the employment of the State Department of Education, Section 87406 is not applicable to you.
2. Not applicable.

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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.

## FACTS

You are a Deputy General Counsel with the Department of Education. For the past 13 years, until December 1997, you were the General Counsel. You are considering employment with a local school district. Your understanding is that a local school district is a "person" for purposes of Sections 87401, 87402, and 87406(d)(1).

In order to derive valuable experience for the state without leaving the state civil service, Government Code Section 19050.8 and 2 Cal. Code Regs. Section 427 provide for interjurisdictional exchanges for up to four years. Although a loaned employee remains a state employee for purposes of civil service laws and regulations, "... the employee's work and activities shall be subject to the direction of the jurisdiction to which loaned or assigned." Thus, during the period of the loan agreement, for all practical day-to-day operational purposes, the loaned employee is an employee of the local jurisdiction. Only for civil service purposes does the employee remain a state employee.

It is contemplated that your duties for the local school district may involve making appearances before the Department of Education to influence administrative or legislative action. It is also contemplated that you may be involved in litigation that may at some point be adverse to the state.

## 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. However, you have only asked specific questions regarding the one-year ban.

### **The One-Year Ban**

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

“[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>2</sup> administrative or legislative action,<sup>3</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." (Emphasis added.)

The central issue is whether such an arrangement constitutes leaving the employment of the State Department of Education. If it does, then you may not, for compensation, attempt to influence the Department of Education as prohibited above. If it does not, then you may attempt to influence the Department of Education free from the restrictions of Section 87406. We find for the following reasons that if you participate in the employee loan program under Section 18950.8, you will not be considered to have left the employment of the Department of Education for purposes of Section 87406.<sup>4</sup>

First, you will be participating in an interjurisdictional employee loan pursuant to Government Code Section 18950.8 that all parties, including your current employer, the Department of Education must approve. Both the Department of Education, the local school district, as well as yourself may end the agreement at any time for any reason, and you would resume working directly for the Department of Education. (2 Cal. Code Regs. § 427.) Second, the purpose of this loan is, in part, to enable you to gain valuable experience for the state without leaving state civil service. Third, you will be an employee of the Department of Education for purposes of the state civil service laws and regulations. (*Ibid.*) Finally, you will remain subject to the conflict-of-interest rules of the Act. (Section 87103.)

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<sup>2</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.

<sup>3</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>4</sup> Please note that this decision is limited to the unique facts of your situation as described herein.

### **Permanent Ban on "Switching Sides"**

While you have not asked any specific questions regarding the permanent ban on "switching sides," you indicate that during the loan period you could become involved in litigation against the Department of Education or attempt to influence the Department of Education. This separate provision provides that:

"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. An employee is deemed to have participated in any proceeding in which the employee actually participated while at his or her former agency, as well as any proceeding which he or she supervised. Therefore, any litigation which you actually participated in or supervised as General Counsel is covered. This may include matters of which you had no actual knowledge. (*Davidian* Advice Letter, No. A-97-076a.)

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. (*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.)

Under Section 87400(c) set forth above, a "proceeding" includes any particular matter involving a specific party or parties in a state administrative agency. (*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. Where the State of California is a party, the prohibition does not apply. Therefore, the prohibition does not apply if the former official is acting on behalf of another state agency or the State of California. 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.) However, we have applied the prohibition to include representation of a county by a former state official. (*Evans* Advice Letter, *supra*; *Berrigan* Advice Letter, No. A-86-045.)

Therefore, if you receive compensation from the county, the prohibition may apply if you terminated your employment with the State Department of Education within the meaning of Sections 87401 and 87402. For the same reasons, we have concluded that you have not left

employment with the State Department of Education for purposes of Section 87406 if you participate in the interjurisdictional loan, we conclude that you will not have terminated employment with the Department of Education. Therefore, Sections 87400-87402 do not apply to you.<sup>5</sup>

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

Sincerely,

Steven G. Churchwell  
General Counsel



By: Marte Castaños  
Staff Counsel, Legal Division

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<sup>5</sup> It is important to stress that this analysis does not address other state laws outside our jurisdiction which may affect you. (E.g., Section 1090 et seq., "Incompatible Activities of State Officers and Employees.")