



FAIR POLITICAL PRACTICES COMMISSION

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April 8, 1998

Lyle A. Smoot
8671 Bamarca Drive
Elk Grove, California 95624

**Re: Your Request for Advice
Our File No. A-98-061**

Dear Mr. Smoot:

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

QUESTIONS

1. Does the one year prohibition in Section 87406 restrict your ability to appear before the State Allocation Board?
2. Does the one year prohibition in Section 87406 restrict your ability to appear before the Office of Public School Construction after you leave state service?
3. Does the one year prohibition preclude you from appearing before the legislative members of the State Allocation Board?

CONCLUSIONS

1. Yes. You may not for a period of one year after you leave state employment appear, for compensation, before the State Allocation Board for the purpose of influencing administrative or legislative action. See Analysis below.
2. No. Section 87406 does not restrict your ability to appear before the Office of Public School Construction.

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

3. Yes. Section 87406 would preclude you from lobbying the legislative members of the State Allocation Board.

FACTS

You have been the Assistant Executive Officer of the State Allocation Board ("SAB") since 1984. The SAB and your position are both authorized by Government Code Section 15490. The SAB is comprised of four legislators (currently State Senators Leroy Greene and Patrick Johnston, and Assemblymembers Kerry Mazzone and Ted Lempert), the Directors of the Departments of Finance and General Services, and the Superintendent of Public Instruction. Your position is the exempt employee of the SAB. In this role, you are responsible for advising the board members regarding legislation or policy related to school facilities issues. The SAB is responsible for allocating mostly state bond funds to school districts for facility related purposes. The legislative members are authorized to have equal voting rights as the other members. Your performance evaluations have always been provided by the Chair of the SAB.

Government Code Section 14620 authorizes a position within the Department of General Services for an Executive Officer of the Office of Public School Construction ("OPSC"). Government Code Section 15504 provides that the Director of General Services is to provide assistance to the SAB in performing administrative functions for the SAB. The OPSC provides this assistance. The organization charts for the OPSC have never included your position.

You are considering employment with a school district in a capacity that would involve school facility funding and working with state government.

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-employment² restrictions under the Act. The first is a permanent prohibition on influencing any judicial, quasi-judicial, or other proceeding in which the administrative official participated while in state service. (Sections 87401 and 87402.) In other words, a public official may never "switch sides"

² In addition, the Act includes a "pre-post employment" restriction on influencing prospective employment while still a state official. (Section 87407.)

in a proceeding³ after leaving state service. Since you do not mention a specific factual circumstance where these sections may apply, we urge you to take note of Sections 87400-87405 in their entirety. 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.

(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.)

You are a state administrative official. (Section 87400(b).) 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.)

³ “‘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).)

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. 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 general rule applies in the context of Sections 87400-87402.

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, No. I-86-117; *Berrigan* Advice Letter, No. A-86-045.)

B. 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:

"[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 influencing⁴ administrative or legislative action,⁵ 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."

Under Section 87406, 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.) This definition has been construed to include public agencies, including local government agencies. (*In re Witt* (1975) 1 FPPC Ops. 1; *Parker* Advice Letter, No. A-98-031.)

Generally, a designated employee's state administrative agency means the agency he or she worked for or represented and any board or commission under the agency's control. (*Parker* Advice Letter, *supra*; *Grimm* Advice Letter, No. I-96-114; *Gould* Advice Letter, No. A-96-077.)

⁴ "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.

⁵ 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.

Clearly, you worked for the SAB. You have not indicated that you represented any other agency other than the SAB.

Therefore, the question remains whether, for purposes of applying Section 87406, your state administrative agency includes the Department of Finance, the OPSC, the Department of General Services, and/or the Superintendent of Public Schools, since the heads of those agencies sit on the SAB and/or since their agencies may be required to assist the SAB in its duties.

The Department of General Services is required by Government Code Section 15504 to provide the SAB with any assistance it needs in order to carry out its duties. The OPSC provides this assistance. However, the Government Code section does not go so far as to place the Department of General Services or OPSC under the control of the SAB. Moreover, the Department of Finance (where the OPSC is located), the Department of General Services, and the Superintendent of Public Schools are all independent state agencies. Therefore, we conclude that the Department of General Services, the Department of Finance, the OPSC, and the Superintendent of Public Schools are not under the SAB's control. (*Grimm* Advice Letter, *supra*; *Burroughs* Advice Letter, No. A-97-290; *Monagan* Advice Letter, No. A-93-473.)

Therefore, you may not, for compensation,⁶ act as representative or agent for any person *before the SAB or any officer or employer thereof* 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.) This would preclude you from influencing any of the members of the SAB, including the legislative members, regarding administrative or legislative action.

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 did 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 as long as the former official was not identified in connection with the appearance or communication. (*Ordos* Advice Letter, No. A-95-052.) Communications with an agency that are not for the purpose of influencing administrative or legislative action are not restricted by Section 87406. For example, an ex-employee can attend informational meetings with the agency, or request information from the agency concerning existing laws, regulations, or policies, as long as the employee does not attempt to influence administrative or legislative action. (See *Bagatelos* Advice Letter, No. I-91-202; and Regulation 18202(a)(1).)

⁶ Again, 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, *supra*.)

The Commission has advised that a former agency official may draft proposals on a client's behalf to be submitted to the agency so long as the former employee is not identified in connection with the client's efforts to influence administrative action. (*Cook* Advice Letter, No. A-95-321; *Harrison* Advice Letter, No. A-92-289.) 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 as long as the employee is not identified with the employer's efforts to influence the agency. (*Perry* Advice Letter, No. A-94-004.)

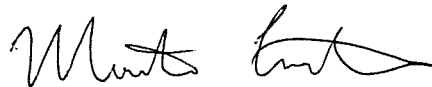
Certain other informal contacts may not be considered influencing. For example, an ex-employee may request information concerning anything that is a matter of public record, such as existing laws, regulations, or policies. (*Tobias* Advice Letter, No. A-96-089; *Harrison* Advice Letter, *supra*.) Further, an ex-employee may attend informational meetings or public forums if the attendance is not for the purpose of influencing agency actions. (*Craven* Advice Letter, *supra*.) Social conversations are also not considered influencing if the conversation is not intended to influence administrative or legislative action. (*Tobias* Advice Letter, *supra*.)

Whether a particular meeting or conversation is for the purpose of influencing legislative action will depend on the individual facts of the case. For instance, if an employee attends a public meeting with numerous other attendees where there are several topics discussed, it may be possible to infer that mere attendance is not for the purpose of influencing the agency's action. Conversely, where there is a small meeting to discuss a particular administrative or legislative action, it may be inferred that the ex-employee's mere presence at the meeting is intended to influence agency action. Therefore, whether the ex-employee may attend such a meeting depends greatly on the facts of that particular meeting and the ex-employee's intentions in attending the meeting.

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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