



FAIR POLITICAL PRACTICES COMMISSION

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June 25, 1998

Kevin Graves
Cambria Environmental Technology, Inc.
1144 65th Street, Suite B
Oakland, California 94608

**Re: Your Request for Informal Assistance
Our File No. I-98-141**

Dear Mr. Graves:

This letter is in response to your request for advice regarding the provisions of the Political Reform Act (the "Act").¹ Because you have not provided material facts regarding a specific case, we are treating your request as one for informal assistance.²

QUESTION

As a former Associate Water Resources Control Engineer with the San Francisco Bay Water Quality Control Board (Region 2) ("regional board"), which post-governmental employment restrictions apply to you?

CONCLUSIONS

1. The permanent ban on "switching sides" prohibits former state administrative officials who have "participated" in a proceeding, as that term is defined in section 87400(d), from being paid to represent or assist in representing another person regarding that same proceeding.

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

² Regulation 18329 provides that the Commission may decline to give formal written advice if it appears that the material facts provided in the request are inaccurate, incomplete, or in dispute. (Regulation 18329(b)(8)(C).) Informal assistance does not provide the requestor with the immunity conferred by formal written advice. (Regulation 18329(c)(3).)

2. The one-year ban prohibits specified former state employees from being paid to communicate with their former state employer, for one year, for the purpose of influencing any legislative or administrative action or any action involving a permit, license, grant or contract, or the sale or purchase of goods or property.

FACTS

You were a staff member of the regional board for nearly five years. During that time, you were primarily assigned to the underground storage tank ("UST") cleanup unit. You were not a designated employee and you did not file financial disclosure forms.

While employed with the regional board, you were responsible for a list of specific cases, which you handled in one of two ways. In some cases, you provided direct oversight and regulatory guidance to parties who were responsible for complying with environmental regulations by meeting with them personally to gather information and by drafting written directives with which the parties were required to comply. Although you did not personally sign any written directive, you did prepare the directives for the signature of a supervisor who was two levels above you. Your proposed directives were often revised and edited by either your supervisor or the supervisor who signed the directive.

In the cases over which you did not directly preside, your involvement was limited to making informal recommendations to local regulatory agencies, such as local health departments or water districts, which would implement the UST cleanup program under the auspices of the state or regional board. These local agencies were not bound to comply with your advice and followed your suggestions about 50 percent of the time.

You, therefore, had different levels of involvement with thousands of UST cases—some you actually worked on, while others were handled by another agency. You are presently employed by an engineering consulting firm that is handling UST cases in your old jurisdiction.

ANALYSIS

The Act places two restrictions on the activities of state officials who have left state service.

Lifetime Ban on "Switching Sides"

Government Code sections 87401 and 87402 prohibit former state administrative officials, who participated in a judicial, quasi-judicial or other proceeding while employed by a state agency, from being paid to represent or assist in representing another person regarding that *same* proceeding.

State Administrative Official

A “state administrative official” is defined as a “member, officer, employee or consultant” of a state agency who, as part of his or her official duties, engages in any judicial, quasi-judicial or other proceeding in other than a “purely clerical, secretarial or ministerial capacity.” (Section 87400(b).) In the *Chalfant* Advice Letter, No. A-92-509, we advised an associate water resources control engineer who drafted tentative waste discharge requirements under the direction of his supervisor that he was a “state administrative official.”

As a water resources control engineer, you drafted written directives and informally advised local regulatory agencies. Because your duties were not purely clerical, secretarial or ministerial, you were a “state administrative official” for purposes of section 87400(b).

Prohibited Conduct

Section 87401 prohibits former state administrative officials, who have participated in a judicial, quasi-judicial or other proceeding, from being paid to represent (e.g., act as an agent or attorney for) another person regarding that same proceeding before any court or state administrative agency. Such activity includes formal and informal appearances and also includes any oral or written communication with the intent to influence.

Section 87402 prohibits state administrative officials from being paid to aid, advise, counsel, consult or assist in representing another person in a proceeding in which the official would be prohibited under section 87401. Thus, if you are prohibited from participating in a proceeding under section 87401, you may not aid or assist another person in your firm who is representing another person in that proceeding.

Participation in a Judicial, Quasi-judicial or Other Proceeding

The crux of your inquiry focuses on whether your involvement with thousands of UST cases qualified as participation in a judicial, quasi-judicial or other proceeding. 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 ...”

We have advised that the investigation of contamination and the issuance of an order requiring the cleanup of contamination are proceedings within the meaning of section 87400(c). (*Witz* Advice Letter, No. A-88-382.)

In the *Witz* letter, we noted that cleanup proceedings present a set of circumstances that are entirely different from investigative proceedings. In investigative proceedings, the issues center around the extent of the contamination. However, once an uncontested cleanup order is issued, the factual disputes in the investigative proceedings are conceded and the parties turn their attention to compliance with the cleanup order. As such, we have advised that investigation and cleanup are *separate* proceedings under section 87400(c). Therefore, if you, as a state administrative official, participated in just the investigation of a particular UST case, the permanent ban would not prohibit you from being paid to represent the responsible parties in complying with a cleanup order.

Section 87400(d) defines “participated” as follows:

“[T]o have taken part personally and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation or use of confidential information as an officer or employee, but excluding approval, disapproval or rendering of legal advisory opinions to departmental or agency staff which do not involve a specific party or parties.”

You have not provided specific facts concerning your involvement with a particular UST case. Consequently, we can only provide general guidance as to whether you “participated” in a UST proceeding.

In the *Chalfant* Advice Letter, *supra*, we advised that an engineer’s drafting of waste discharge requirements for a specific landfill including a closure order and requirements for a closure plan, which were later reviewed by his supervisor and adopted by the agency’s board, was “participation” as defined in section 87400(d). Applying the *Chalfant* letter, it would appear that your involvement in UST cases for which you prepared written directives for the signature of a supervisor who was two levels above you would be considered “participation” under section 87400(d).

Without specific facts describing your involvement on cases handled by local authorities, it is difficult to determine whether your activities constitute participation as defined in section 87400(d). Generally, participation must be decided on a case-by-case basis. Section 87400(d) provides that participation includes “rendering advice on a substantial basis” and using “confidential information.” Therefore, if you gave substantive advice to a local agency concerning a significant aspect of a particular UST proceeding or if you made a recommendation with knowledge of confidential information, you will be deemed to have participated in the proceeding.

However, if your advice was merely procedural in nature or involved only a minor aspect of a particular UST proceeding and was not made with knowledge of confidential information, then such activity will probably not rise to the level of participation required to trigger the permanent ban.

For example, in the *Hetrick* Advice Letter, No. A-82-110, a former state employee advised a party whether an application had requisite local approvals and whether it contained sufficient detail and supporting documentation to enable his agency to review the application. Under those circumstances, we advised the employee that his involvement was not participation for purposes of section 87400(d), since he did not participate in a substantive review of the application and he was not involved in any confidential agency discussion regarding the application.

One-Year Ban

In addition to the permanent ban, the Act prohibits specified officials, for one year after leaving state service, from being paid to communicate with or appear before their former agency 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 of goods or property. (Section 87406(d)(1).)

Former Employees Who Are Covered

Section 87406 applies to former state employees who held positions, which entailed *making, or participating in making*, governmental decisions that had a foreseeable material financial effect on any financial interest.

Under regulation 18700,³ an employee of a state agency “makes a governmental decision” when he or she: (1) votes on a matter; (2) appoints a person; (3) obligates or commits his or her agency to any course of action; (4) enters into any contractual agreement on behalf of his or her agency; or (5) determines not to act, other than to avoid a conflict of interest. (Regulation 18700(b).) It does not appear from your facts that you *made* governmental decisions as defined above.

An employee of a state agency “participates in making a governmental decision” when he or she negotiates (without significant substantive review) with a governmental entity or private person regarding the decision, or when he or she advises or makes recommendations to the

³ Although the Commission promulgated regulation 18700 with reference to section 87100 of the Act, the regulation’s definitions are instructive for defining the provisions of section 87406 of the Act. (*Martinez* Advice Letter, No. A-94-085.)

decision-maker (either directly or without significant intervening substantive review) by either: (1) conducting research or an investigation, which requires the exercise of independent judgment on the part of the employee and the purpose of which is to influence a decision; or (2) preparing or presenting any report, analysis or opinion, which requires the exercise of independent judgment on the part of the employee and the purpose of which is to influence a decision. (Regulation 18700(c).)

While employed with the regional board, you met with responsible parties personally to gather information and you drafted written directives. You did not personally sign any written directive. Instead, you prepared the directives for the signature of a supervisor who was two levels above you. Your proposed directives were often revised and edited. In addition, you made informal recommendations to local regulatory agencies. These local agencies were not bound to comply with your advice and followed your suggestions about 50 percent of the time.

We have advised that an official participates in the making of a governmental decision, even if it is reviewed by several of his superiors, if any of the following apply: 1) the superiors rely on the data or analysis prepared by the official without checking it independently; 2) the superiors rely on the professional judgment of the official; or 3) the official in some other way actually influences the final decision. (*Lilyquist* Advice Letter, No. M-96-318.)

The facts in your letter suggest that your superiors and local regulatory agencies relied to some degree on your professional judgment. Thus, under regulation 18700(c), you *participated in making* governmental decisions by drafting written directives and advising local regulatory agencies. Accordingly, you are subject to the one-year ban.

Prohibited Conduct

Under the one-year ban, you are prohibited from being paid to communicate or appear before the regional board for 12 months for the purpose of influencing administrative or legislative action. (Section 87406(d)(1).)

“Administrative action” refers to the proposal, drafting, development, consideration, amendment, enactment or defeat of any rule, regulation or other action in any rate-making proceeding or any quasi-legislative proceeding. (Section 82002.)

“Legislative action” means the drafting, introduction, consideration, modification, enactment or defeat of any bill, resolution, amendment, report, nomination, or other matter by the Legislature and also includes the action of the Governor in approving or vetoing any bill. (Section 82037.)

Pursuant to the one-year ban, you are also prohibited from being paid to communicate or appear before the regional board for 12 months for the purpose of influencing any action 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(d)(1).)

You are presently employed by an engineering consulting firm that is handling UST cases in your old jurisdiction. Since you have not provided specific facts regarding your firm's activities with the regional board, we can only offer general guidance.

In the *Ordos* Advice Letter, No. A-95-052, we advised that the one-year ban did not prohibit a former executive director of the Commission from appearing before the agency regarding an enforcement action. An FPPC enforcement proceeding does not fit within the definitions of "legislative action" or "administrative action" as defined in the Act, nor is it an action involving a permit, license, grant or contract, or the sale or purchase of goods or property.

We have also advised that the one-year ban does not prohibit a former state employee from appearing before his or her prior agency regarding agency actions that are purely ministerial. For example, in the *Sweeney* Advice Letter, No. A-98-022, we advised that the one-year ban did not prohibit a former state employee from filing campaign reports with the Secretary of State's office. We have also advised that when an agency issues a permit subject to clear and objective criteria as set forth in a statute, ordinance or regulation, the action is ministerial and an appearance by a former employee regarding that action is not prohibited by the one-year ban. (*Miller* Advice Letter, No. I-93-098.)

The one-year ban also does not prohibit a former agency official from drafting proposals on a client's behalf to be submitted to the agency as 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 one-year ban does not prevent a former employee from using his or her expertise to advise clients on the procedural requirements, plans, or policies of his or her 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.)

We have further advised that communications with an agency that are not for the purpose of influencing administrative or legislative action (or any other proceeding specified in section 87406) are not restricted by the one-year ban. For example, an ex-employee can attend informational meetings with the agency, or request information from the agency concerning existing laws, regulations, or policies, so long as the employee does not attempt to influence administrative or legislative action. (*Tobias* Advice Letter, No. I-96-089.)

If you would like additional guidance or 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 that reads "Julia Butcher". The signature is written in a cursive, flowing style.

By: Julia Butcher
Staff Counsel, Legal Division

SGC:JB:jlw