



FAIR POLITICAL PRACTICES COMMISSION

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April 17, 1999

Gary Grimm
Law Offices of Gary J. Grimm
2390 Vine Street
Berkeley, California 94708

Re: Your Request for Advice
Our File No. A-99-086

Dear Mr. Grimm:

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

QUESTION

Having left your employment at the California Regional Water Quality Control Board, San Francisco Bay Region (the "regional board") more than two years ago, may you now, without violating the Act, represent the East Bay Regional Park District in its new application for specific revision and amendment of regional board order no. 94-187?

CONCLUSION

The proposed amendment would constitute a new proceeding, separate and distinct from any earlier proceedings in which you participated as board counsel. As a result, your representation of the Park District on this matter would not violate the Act's restrictions on the activities of former state administrative officials.

FACTS

You were employed as Staff Counsel by the State Water Resources Control Board from 1973 through August, 1996. Your principal duty was to provide legal services and advice to the California Regional Water Quality Control Board, San Francisco Bay Region (the "regional board") and its staff.

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

One of the responsibilities of regional boards under the California Water Code is the adoption of waste discharge requirements for discharges of waste into waters of the state. Persons who discharge such waste must submit reports to the regional boards concerning any existing or proposed discharge. Once a report has been submitted, a regional board may adopt waste discharge requirements after appropriate notice and hearing. Regional boards periodically review and revise these requirements as new issues arise. During your tenure as counsel to the regional board, you regularly advised staff and board members at regional board meetings on legal matters relating to adoption of waste discharge requirements.

From 1942 until 1980, Oakland Scavenger Company ("OSC") conducted landfill operations on 247 acres known as the Davis Street Landfill in San Leandro, California. The site ceased accepting waste in 1980. In April 1979, OSC and the East Bay Regional Park District (the "Park District") entered into an agreement through which OSC agreed to donate 194 acres to the Park District. It has been the intent of the Park District to develop the site as a public park.

In August 1980, the regional board issued order no. 80-37, naming OSC as the waste discharger and requiring certain remedial steps for closure of the site. In 1986, Waste Management of Alameda County, Inc. ("Waste Management") acquired OSC.

In December, 1994, the regional board adopted order no. 94-187 on its uncontested calendar, amending order no. 80-37 to require various changes to the site closure requirements and remediation, including expanded site monitoring and development and implementation of an acceptable leachate management plan. Waste Management (as the former site operator) and the Park District (as the current property owner) were both named as waste dischargers in this order.

You were employed by the regional board when the 1980 and 1994 orders were adopted. Although you do not recall providing any legal advice to staff or the regional board on these two matters, you have not conducted a full search of the board files to determine your involvement in those matters. For purposes of this request, we can assume that you "participated" (within the meaning of the Act) in the 1980 and 1994 proceedings.

Since adoption of order no. 94-187, a disagreement has arisen between the Park District and Waste Management. Waste Management contends that order no. 94-187 treats both entities equally as waste dischargers. You have been asked by the Park District to explore the possibility of revision and amendment of order no. 94-187 to name Waste Management as the discharger primarily responsible (with primary liability) for cleanup and remediation of the site, and to name the Park District as secondarily liable for remediation in the event that Waste Management fails to comply with the order. You would provide legal advice, and possibly represent the Park District before the regional board on this matter.

Apportionment of responsibility as between the two waste dischargers was not considered by the regional board in 1994, or at any time when you were counsel to the board. This new question would present facts and issues that the board would have to address for the first time.

ANALYSIS

Your question is governed by the Act's post-employment restrictions on former state employees and officials. (Sections 87400-87407.) There are three such restrictions: (1) a prohibition on communication with a state agency, applied to persons who have left the employ of that agency *within the previous year*, when the communication would concern legislative, administrative, or other enumerated proceedings; (2) a permanent ban on former agency officials "switching sides" in any proceeding where the state is a party or has a substantial interest; and (3) a prohibition on participation by current agency officials in matters affecting a person with whom the official is negotiating employment. Only the permanent ban on "switching sides" has potential application to the circumstances described in your letter.

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.)

As a former state administrative official,² you are subject to the permanent ban in Sections 87401 and 87402 to the extent that you have participated in any judicial, quasi-judicial or other proceeding. "Participated" is defined in relevant part as "to have taken part personally and substantially through decision, approval, disapproval, [or] formal written recommendation" (Section 87400(d); Regulation 18741.1.) You are not sure whether or not you "participated" in the 1980 and 1994 orders at issue in this matter, and we *presume* your participation for purposes of this letter. It is also clear that the board's orders to specific waste dischargers are

² Legal counsel to the regional board clearly fits the definition of "state administrative official." (Section 87400(b).)

“proceedings” within the meaning of Sections 87400 *et seq.*³ What remains to be decided is whether the Park District’s application is a continuation of an earlier proceeding in which you participated, or whether it is a *new* proceeding, in which you would not be subject to the permanent ban on “switching sides.”

We regard as “new” a proceeding involving different parties, different properties, or different factual or legal issues from those considered in previous proceedings. In cases like yours, we have often explained that when the parties to prior discharge or cleanup proceedings return to an agency with questions involving new or different facts and issues, a *new* proceeding may be initiated to which the prohibitions of Sections 87401 and 87402 do not apply. (*Chalfant* Advice Letter, No. A-92-509; *Witz* Advice Letter, No. A-88-382; *Anderson* Advice Letter, No. A-86-324; *Galanter* Advice Letter, No. A-82-079).

The *Witz* letter is illustrative. Mr. Witz was a member of the Regional Water Quality Control Board when the board was investigating Lockheed for local water contamination. Mr. Witz left the board after participating in the investigation. The board concluded its investigative proceeding by issuing an order that required Lockheed to clean up the contaminated water. Lockheed then contracted with Mr. Witz’ new employer for consulting services regarding implementation of the required cleanup. We observed:

“[T]he same company is involved in both the investigation and the clean up and the same issue of water contamination exists. However, the clean up proceedings present a set of circumstances that are entirely different from the investigative proceedings that took place before issuance of the Executive Order. In the investigative proceedings, the Board staff was no doubt attempting to resolve issues as to the extent of the water contamination and Lockheed’s culpability. On the other hand, once the Executive Order issued and Lockheed chose not to contest it, [footnote omitted] these issues were conceded and the parties turned their attention to compliance with the order.”

In *Witz*, details of the required cleanup were worked out in a “compliance” proceeding that was separate and distinct from the investigative proceedings that led to the original order. So participation in the initial proceeding was no barrier to employment on the subsequent cleanup project. In *Chalfant*, the former official had *also* participated in the proceedings that established the details of remediation, and could not therefore participate in a bid to perform the

³ 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.”

work specified in that proceeding. However, once the bids were evaluated and the contract awarded, the former official could appear in any proceedings that arose from actual implementation of the cleanup, because the issues arising in the context of performance would differ from the issues treated by the board in any prior proceeding. (*Id.*)

In the present matter, we understand that you participated in the board's investigatory proceedings, *and* in establishing cleanup requirements for the property in question. You state, however, that the board did not consider the relative liability of Waste Management and the Park District when the board was deciding on the cleanup measures to be required in order no. 94-187. Because the board was silent on this subject, a dispute has arisen between Waste Management and the Park District over their relative liability under the cleanup order. The Park District wishes to hire you to assist in securing an amendment to order no. 94-187 that addresses the issue of primary and secondary liability for the cleanup that has already been ordered.

The subject matter of the proposed amendment is plainly an implementation dispute arising after issuance of the remediation order, which the *Chalfant* Advice Letter recognized as giving rise to a new proceeding. In deliberating on this amendment, the board may have to consider again historical facts regarding ownership of the property and commercial operations thereon. But these facts will be marshaled to decide substantial legal and equitable questions relating to implementation of an existing order, questions neither decided nor considered by the board in any prior proceeding. We conclude that an amendment apportioning responsibility for the cleanup mandated by the board's 1994 order will require a new proceeding to which the prohibitions of Sections 87401 and 87402 do not apply.

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

Sincerely,

Steven G. Churchwell
General Counsel



By: Lawrence T. Woodlock
Staff Counsel, Legal Division

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