



FAIR POLITICAL PRACTICES COMMISSION

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January 12, 2000

Francisco Ramirez
6615 Grant Avenue
Carmichael, California 95608

**Re: Your Request for Advice
Our File No. A-99-300**

Dear Mr. Ramirez:

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

QUESTIONS

After your retirement as Director of Community Relations for the California State University System, what restrictions will limit your ability to appear before the California State University System?

After your retirement, may you appear before the Legislature and administrative agencies that you did not represent during your state employment?

After your retirement, may you work as an advisor or marketing consultant for the private sector with local, state and/or federal governmental entities?

CONCLUSIONS

You may not at any time represent or assist in representing another person in any judicial, quasi-judicial, or other proceeding in which you participated while employed by the CSUS. For one year after you leave the California State University System ("CSUS"), you may not make any appearance or communication, for compensation, before the CSUS, any officer or employee of the CSUS, or any CSUS campus, for the purpose of influencing administrative or legislative

¹ Government Code sections 81000 - 91015. Commission regulations appear at title 2, sections 18109 - 18996, of the California Code of Regulations.

action, or influencing any action or proceeding involving the issuance, amendment, award, or revocation of a permit, license, grant or contract, or the sale or purchase of goods or property. You may lobby the Legislature and administrative agencies in the executive branch which you have *not* represented, so long as the matter does not involve a judicial, quasi-judicial, or other proceeding in which you participated while at the CSUS.

FACTS

You are currently a state employee employed by the California State University System, in the position of Director, Community Relations. In this position you were involved in "outreaching" into the various communities of California, marketing CSUS to the public and to various non-profit entities. You were also expected to develop and implement communication strategies to support the mission of the Board of Governors. Your activities did not include development, issuance, amendment, award or revocation of any permit, license, grant or contract, or the sale or purchase of goods, services or property to or for the CSUS. You have not told us of any other past state employment. You plan to retire from state service in mid-January 2000. You expect to become a self employed consultant assisting persons in their dealings with various government agencies, not including the CSUS.

ANALYSIS

A. The permanent ban on "switching sides."

Public officials who leave state service are subject to two types of post-employment 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" in a proceeding after leaving state service. Since you do not mention any specific circumstance where the "permanent ban" might apply to you, we will discuss it generally.

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.)

It appears from your account of the facts that you meet the definition of a “state administrative official” given at Section 87400(b). As a Director within the CSUS, you certainly were vested with discretionary authority. Thus, if you have participated at any time during your state employment in any judicial, quasi-judicial, or other proceedings, you will be subject to the permanent ban as to those proceedings.

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 “participates” in a proceeding if the official takes part “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); Regulation 18741.1(a)(4).) This includes proceedings in which the official actually participates, and proceedings which the official supervised.

“Participation” in a proceeding includes any appearance or communication made for the purpose of “influencing” that proceeding, as “influencing” is defined at Regulation 18746.2. (Regulation 18741.1(a)(3).) Under Regulation 18746.2:

“(a) For purposes of Government Code Section 87406, a formal or informal appearance or oral or written communication is for the purpose of influencing if it is made for the for the principal purpose of supporting, promoting, influencing, modifying, opposing, delaying, or advancing the action or proceeding. An appearance or communication includes, but is not limited to, conversing by telephone or in person, corresponding with in

writing or by electronic transmission, attending a meeting, and delivering or sending any communication.

(b) An appearance or communication is not limited by this section when an individual:

- (1) Participates as a panelist or formal speaker at a conference or similar public event for educational purposes or to disseminate research and the subject matter does not pertain to a specific action or proceeding;
- (2) Attends a general informational meeting, seminar, or similar event;
- (3) Requests information concerning any matter of public record; or
- (4) Communicates with the press.”

Under Sections 87400-87402, only *compensated* post-employment services are banned. Regulation 18741.1(a)(2) provides that “compensation” does not include “a payment made for necessary travel, meals, and accommodations received directly in connection with voluntary services.” A former public official cannot escape the prohibition of Section 87406 by charging a client for some activities, and “volunteering” for others. (Regulation 18741.1(a)(2); *Weil* Advice Letter, No. A-97-247.) The same principles apply in the context of Sections 87400-87402.

Where the State of California is a party, the prohibition does not apply. (Sections 87401, 87402 and Regulation 18741.1(a)(2).) 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 these provisions do not prevent a former state administrative official 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.)

In sum, Sections 87401 and 87402 would not prevent you from lobbying the Legislature, the CSUS, or any other state agency *unless* the matter involved a judicial, quasi-judicial, or other proceeding in which you made an appearance or communication for the purpose of influencing that proceeding, as described above.

B. 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:

“[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 influencing² administrative or legislative action,³ 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 agency⁴ 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.”

As Director of Community Relations, you were a designated employee of the CSUS. Therefore, Section 87406 is applicable to you. (See, also, Regulation 18746.1(a).)

Generally, a designated employee's "agency" means the agency for which he or she worked, and any board or commission under the agency's control. (Regulation 18746.1(b)(6); *Gould* Advice Letter, No. A-96-077.) In the context of CSUS, your "agency" would also include each CSUS campus. (See *Garcia* Advice Letter, No. A-97-445). A designated employee is not, however, ordinarily restricted by Section 87406 from lobbying the Legislature or Governor regarding legislation. (*Witherspoon* Advice Letter, *supra*; *Craven* Advice Letter, No. A-93-057.)

² "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.) Regulation 18746.2, quoted above, more fully defines "influencing" for purposes of Section 87406. "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.

³ 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.

⁴ For purposes of Section 87406, we have advised that "state administrative agency" means every state office, department, division, bureau, board and commission, but does not include the Legislature, the court or any agency in the judicial branch of government. (Section 87400; *Michelotti* Advice Letter, No. I-93-102.)

In the *Gould* Advice Letter, *supra*, we advised that a former director of the Department of Finance, a distinct state administrative agency, may lobby administrative agencies in the executive branch by which he was not employed during the course of his government service. In the course of his employment, we concluded that he participated in the budget process as an advisor to the Governor and the Legislature, but he did not work for or represent those agencies within the meaning of Section 87406(d)(1). Similarly, you would not be restricted under Section 87406(d) from lobbying the Legislature or the Governor since you did not work for the Legislature and the CSUS is not subject to the direction and control of the Governor's office as contemplated by Section 87406(d)(2). (*Wright* Advice Letter, No. A-96-277.)

Under Section 87406, therefore, you may not for twelve months after leaving your state employment act as the compensated representative or agent for any person *before the CSUS, or any officer or employee of the CSUS or any CSUS campus*, for the purpose of influencing administrative or legislative action, or in any action or proceeding involving the issuance, amendment, award, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property.

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 does not restrict a former official from assisting or advising clients or others who might themselves appear before or communicate with the official's former agency regarding a regulation or legislation, so long as the former official is not identified in connection with the appearance or communication of the third person. (*Ordos* Advice Letter, No. A-95-052.)

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 ex-employee is not identified with the employer's efforts to influence the agency. (*Perry* Advice Letter, No. A-94-004.)

Appearances before or communications with an agency which are *not* for the purpose of influencing administrative or legislative action are, of course, not restricted by Section 87406. Whether a particular meeting or conversation is for the purpose of influencing administrative or legislative action (as defined by Regulation 18746.2) depends on the facts of each case. For instance, if an ex-employee attends a public meeting with many other persons, where there are many topics on the agenda, it may be reasonable to infer that the ex-employee's 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 more readily be inferred that the former employee's presence at the meeting is intended to influence agency action.

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

Sincerely,

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Assistant General Counsel



By: Lawrence T. Woodlock
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