



## FAIR POLITICAL PRACTICES COMMISSION

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March 17, 2000

Kathleen Elbe  
6367 North Point Way  
Sacramento, California 95831

**Re: Your Request for Advice  
Our File No. I-00-035**

Dear Ms. Elbe:

This letter is in response to your request for advice regarding the provisions of the Political Reform Act (the "Act").<sup>1</sup> Because your inquiry is general in nature, we are treating your request as one for informal assistance.<sup>2</sup> (Regulation 18329(b)(9).)

### QUESTION

Do the one-year revolving door or permanent ban provisions of the Act apply to you?

### CONCLUSION

The one-year ban does not apply to you unless you should have been designated in the Department of Personnel Administration's conflict of interest code. However, the permanent ban may apply if you are assisting a consulting firm or any other person regarding proceedings in which you participated as a "state administrative official" of the Department of Personnel Administration or the State Controller's Office.

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

<sup>2</sup> Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

## FACTS

You retired on February 1, 2000, from the Department of Personnel Administration ("DPA"). You worked for DPA from June 1998 to January 2000 (18 months) as a Personnel Management Analyst III. This position is not listed in DPA's conflict of interest code. You informed me that you had no decision making authority and that no position at that level was in DPA's conflict of interest code. Immediately prior to working for DPA, you worked for the State Controller's Office ("SCO") for many years. For much of that time, you were a designated employee. You voluntarily chose to accept a position that was three levels below your position at SCO when you accepted your position at DPA. At both DPA and SCO, you worked on a project which involved procurement of a new human resource system for the State of California. Both DPA and SCO are evaluating various bids. You intend to work for a consulting firm that submitted one of these bids. Your work with the consulting firm would in no way involve contact with these departments. It would entail such tasks as interpreting state requirements and critiquing the company's written and oral presentations.

## ANALYSIS

### A. One-Year Ban

Section 87406 prohibits specified state employees, for one year after leaving state service, from being paid to communicate with their former agency in an attempt to influence legislative or administrative action or any action or proceeding involving a permit, license, contract or the sale or purchase of goods or property. The one-year prohibition applies to employees who are designated in their former agency's conflict of interest code or to employees who *should have been* designated in their former agency's conflict of interest code. (Regulation 18746.1(a)(2).)

Subdivision (a) of Regulation 18746.1 reads as follows:

"(a) The prohibitions of subdivision (d) of Government Code Section 87406 apply to the following:

- (1) Any member of a state board or commission with "decisionmaking authority," as that term is defined in 2 Cal Code Regs. Section 18701(a)(1);
- (2) *Any employee of a state administrative agency who holds a position that is designated or should be designated in the agency's conflict of interest code; and*
- (3) Any individual enumerated in Government Code Section 87200 appointed to or employed by a state administrative agency.

You state that you were a non-designated employee of DPA from June 1998 to January 2000. Therefore, the one-year ban does not apply to you unless your position should have been designated in DPA's conflict of interest code. You indicated to me that your position at DPA had no decision making authority. Section 87302 requires agencies to enumerate positions which involve the making or participating in the making of decisions which may foreseeably have a material financial interest for each such position. If your agency made a determination

that your position should not be included in a conflict of interest code, pursuant to the requirements of Section 87302, the revolving door law does not apply to you. You have not provided sufficient facts concerning your agency's determination to reach a conclusion on this issue. *If your position at DPA should have been listed in DPA's conflict of interest code, the one-year ban applies to you with respect to DPA. (Unterreiner Advice Letter, No. I-98-299.)*

**B. Lifetime Ban on "Switching Sides"**

In addition to the one-year ban, the Act prohibits former state administrative officials from advising or representing any person for compensation in any judicial or other proceeding (including a contract) in which the official participated while in state service. (Sections 87401 and 87402.) A "state administrative official" is defined as "every member, officer, employee or consultant of a state agency who as part of his or her official responsibilities engages in any judicial, quasi-judicial or other proceeding in other than a purely clerical, secretarial or ministerial capacity. (Section 87400(b).)

Specifically, Section 87401 provides:

"No former state administrative official, after 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 or 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.*" (Emphasis added.)

In addition, Section 87402 prohibits former state administrative officials from being paid to "aid, advise, counsel, consult or assist in representing" any other person in any proceeding in which the official would be prohibited from appearing under Section 87401.

The permanent ban pertains to "judicial, quasi-judicial or other proceedings" in which you participated as a state administrative official, including contracts. (Section 87401.) Thus, you may not, for compensation, represent any company before a state administrative agency or any officer or employee thereof regarding a contract if the contract was one in which you participated during your tenure at DPA or SCO. "Participation" means "to have taken part

personally and substantially through decision [or] approval ...." (Section 87400(d).) A supervisor is deemed to have participated in any proceeding that was pending before the agency under his or her authority. (Regulation 18741.1(a)(4).)

However, the permanent ban does not restrict your ability to participate in a new proceeding. For example, we advised a former supervisor with the Department of Health Services that she could assist a client in reviewing a new RFP issued by the department involving a project on which she had previously worked. (*Pratt* Advice Letter, No. A-95-386.) The new RFP, which was issued after she left the department, involved a new contract and was, therefore, a separate proceeding for purposes of Sections 87401 and 87402. Accordingly, if new contracts develop from the projects in which you participated as a state administrative official of DPA or SCO, the permanent ban would not prohibit you from assisting a private sector employer in bidding on such contracts.

You have not provided specific enough facts for us to determine whether the permanent ban will prohibit you from consulting or working for a consulting firm that may do business with DPA or SCO. Generally, you may do so as long as your work does not relate to a proceeding in which you participated while employed with DPA or SCO. Please note that if a proceeding was initiated at SCO and the same proceeding is now pending before DPA, the permanent ban would apply to you as to that proceeding. Also, you may not aid, advise, counsel, consult or assist private companies pertaining to proceedings in which you participated as a state administrative official, including contracts. (*Bohart* Advice Letter, No. I-99-319.)

I am attaching a fact sheet for your review. If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca  
Assistant General Counsel



By: Lynda Doherty  
Political Reform Consultant  
Legal Division

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Enclosure