



## FAIR POLITICAL PRACTICES COMMISSION

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April 17, 2000

Frederick Morawcznski  
10852 Spring Valley Road  
Marysville, California 94901

**Re: Your Request for Advice  
Our File No. A-00-065**

Dear Mr. Morawcznski:

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

### QUESTIONS

- 1) Under the provisions of sections 87400-87406, would you, as the Executive Director of the Chief Probation Officers of California (CPOC), be restricted in any activities or communications with the Board of Corrections (BOC), as those activities or communications may relate to continuing or refunding specific grants?
- 2) Under the provisions of sections 87400-87406, would you, as the Executive Director of the CPOC, be restricted in any activities or communications with the BOC, the Legislature or other state agencies as those activities or communications may relate to training of probation staff, monitoring compliance with standards concerning juvenile halls, ranches and camps and of training programs for probation staff, and revision of those standards?
- 3) As a Field Representative for the Board of Corrections, if the provisions of section 87406(d)(1) are applicable to you, and you leave state employment and obtain compensated employment as Executive Director of the CPOC, an affiliate organization of the California State Association of Counties ("CSAC"), will you face restrictions in communications with staff from the Board of Corrections, the Department of Corrections, the California Youth Authority and the Youth and Adult Correctional Agency?
- 4) Do the provisions of section 87407 apply to you?

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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.

## CONCLUSIONS

### Question 1:

#### *Permanent Ban*

You are banned for life from attempting to influence, on behalf of another, any judicial, quasi-judicial or other proceeding in which the State of California is a party or has a substantial interest and in which you participated when employed with the BOC at any time, including specific grant programs in which you were involved.

#### *One-Year Ban*

Under the Act's provisions, you are prohibited for one year after leaving state employment from attempting to influence administrative or legislative action by the BOC, or any actions or proceedings involving the issuance, amendment, award, or revocation of a permit, license, grant or contract, or the sale or purchase of goods or property before the BOC. This ban does not, however, prohibit you from attempting to influence the Legislature.

### Question 2:

#### *Permanent Ban*

You are permanently banned from attempting to influence any proceeding involving the state and parties you advised with respect to your compliance activities.

#### *One-Year Ban*

Insofar as your question suggests you would be required as Executive Director of the CPOC to contact the BOC with respect to regulatory standards concerning the juvenile halls, ranches, and camps and training programs, you would be prohibited from doing so for one year. You would not be prohibited pursuant to the one-year ban from contacting the Legislature or other state agencies.

### Question 3:

For the purposes of the one-year ban, your "former state agency" would be the BOC.

### Question 4:

Section 87407 applies to you. You may not make, participate in making, or use your official position to influence any governmental decision directly relating to any person with whom you are negotiating, or have any arrangement concerning, prospective employment.

## FACTS

You currently are employed as a field representative for the State of California Board of Corrections ("BOC" or "board"). Field representatives are designated employees and are required to file annual statements of economic interests.

The BOC is a statutory creation of the California Penal Code, existing in the Youth and Adult Correctional Agency (YACA). The board's membership is made up of statutorily required members as follows: the Secretary of the Youth and Adult Correctional Agency, the directors of the California Youth Authority (CYA) and the Department of Corrections (DOC), and ten other members appointed by the Governor. The BOC, CYA and DOC are "sibling" departments under YACA. The board has staff including an executive director, deputy directors, field representatives and various support personnel. You report directly to one of the agency's three deputy directors.

As a field representative, you oversee the Juvenile Crime Enforcement and Accountability Challenge Grant awarded to counties and operated by county probation departments under individual contracts with the board. Since September of 1996, you have been assigned the primary duty of monitoring this program. In this capacity you evaluate grant recipient goals and their progress/compliance with their grant proposal. Other activities you describe include conducting site visits, monitoring contracts between the state and counties as they relate to the performance of grant activities, providing technical assistance to counties, and other duties as may be required in the administration of a grant program. Although you provide technical information to the board, you do not participate in executive management decisions determining policy recommendations to the board.

Prior to September of 1996, you state you were assigned to work in the Standards and Training for Corrections division of the BOC.<sup>2</sup> In this capacity you provided oversight to a statewide training program for probation and correctional officers, and in the Facility Standards and Operations division, which is responsible for the inspection of county jails and juvenile facilities, relative to their compliance with Title 24 of the California Code of Regulations. In both of these functions, you write, you were responsible for several counties and county agencies, providing technical assistance and monitoring compliance with state regulations.

You are considering an employment arrangement whereby you would be a contract employee for the California State Association of Counties ("CSAC"). Your duties, however, would be to serve exclusively as Executive Director for the Chief Probation Officers of

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<sup>2</sup> The work of the BOC is divided into three divisions, the Facilities Standards and Operations Division, the Corrections Planning and Programs Division and the Standards and Training for Corrections Division.

California ("CPOC"), a professional association, and an affiliate organization of CSAC. CPOC's membership includes all chief probation officers in the state and its purpose is to advance legislative funding, public relations, and regulatory issues affecting probation and corrections on a statewide basis.

In your original request for advice and subsequent amended requests, you state that as a professional association, the CPOC is involved in a wide variety of activities including public relations, technical assistance to counties, and legislative advocacy. The CPOC has a paid lobbyist on staff, and CPOC legislative committee members, as well as the general membership, actively attempt to advance legislative issues as they may arise. Although not the primary role, the Executive Director would be expected to be knowledgeable regarding legislative initiatives, occasionally speak with members and staff of the Legislature and state agencies to gather information, and to articulate the association's position on a wide array of issues. From time to time the standards are amended via the regulatory process, and as the Executive Director for CPOC you may be asked to present testimony or provide assistance in drafting amendments to regulatory standards. In light of the organizational construct of the BOC within YACA and as appointees of the Governor, the BOC does not independently advocate legislative positions. Therefore, you indicate CPOC legislative advocacy would not be directed at the BOC, but rather to the Legislature and the Administration.

### ANALYSIS

- I. *Under the provisions of sections 87400-87406 would you, as the executive director of the Chief Probation Officers of California (CPOC), be restricted in any activities or communications with the Board of Corrections (BOC), as those activities or communications may relate to continuing or refunding specific grants?*

#### **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. (§§ 87401 and 87402.) In other words, a public official may never "switch sides" in a proceeding after leaving state service.

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." (§ 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." (§ 87402.)

*1) Are You a State Administrative Official?*

To be subject to the provisions set forth above, you must be a "state administrative official." Section 87400, subdivision (b) declares a "state administrative official" to mean:

"... every member, officer, employee or consultant of a state administrative 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."

According to your request for advice, as a Field Representative for the Board of Corrections you, among other things, oversee grants for juvenile crime prevention programs awarded to counties and operated by county probation departments. Other activities include conducting site visits, monitoring contracts between the State and counties as they relate to the performance of grant activities, and other duties associated with the administration of a grant program. As a result, you have satisfied the definition discussed above and are a "state administrative official" for the purposes of sections 87401 and 87402. Thus, if you have participated at any time during your state employment in any judicial, quasi-judicial, or other proceeding, you will be subject to the permanent ban as to those proceedings.

*2. Did You Participate in Any 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, 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.)

Regulation 18741.1, subdivision (a)(4), elaborates, stating:

"The judicial, quasi-judicial or other proceeding includes any proceeding in which the official participated personally and substantially by making, participating in the making, or influencing of a governmental decision...but excluding any proceeding involving the rendering of a legal advisory opinion not involving a specific party or parties. Any supervisor is deemed to have participated in any proceeding which was 'pending before' ... the official's agency and which was under his or her supervisory authority."

An official "participated" in a decision where he or she has:

" ... 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." (§ 87400, subd.(d).)

Thus, 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." (§ 87400(d); Regulation 18741.1(a)(4).) This includes proceedings in which the official actually participates, and proceedings which the official supervised.

Clearly, your duties as a Field Representative which include overseeing the administration of a state juvenile grant program are within the scope of activities described above. The administration of the state grant is a proceeding, analogous in some ways to the oversight of a contract, involving specific parties - the recipients of the grants. In your capacity as an official overseeing the grant's administration through monitoring, inspecting, and provision of written recommendations and advice, these proceedings are quasi-judicial proceedings in which you participated.

Thus, once you leave state service you may not, for compensation, represent any person or entity (other than the State of California) before the Board of Corrections regarding any juvenile grants in which you participated. In fact, this permanent ban applies not only to representation made by you before the BOC but also before "any court or state administrative agency or any officer or employee thereof..." (§ 87401.)

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 grants develop from the projects in which you participated as a Field Representative for Corrections, the permanent ban would not prohibit you from assisting a private sector employer from attempting to influence decisions concerning that grant. A one-year ban, however, may restrict that activity for one year.

### **The One-Year Ban**

In addition to the permanent ban discussed above, the Act prohibits specified officials, for a period of 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, contract or the sale of goods or property. (§ 87406, subd.(d)(1).)

Your request acknowledges that as a Field Representative for Corrections you were a designated employee of the department. Therefore, Section 87406 is applicable to you. (See, also, § 82019, subd.(c); Regulation 18746.1, subd.(a)(2).)

### *Scope of Ban*

First and foremost, the activities proscribed by Section 87406, subdivision (d)(1) are those activities *before* an agency "*for which [you] worked.*" (§ 87406, subd. (d)(1), italics added.) In the *Gould Advice Letter*, No. A-96-077, we advised that a former director of the Department of Finance, a distinct state administrative agency, may lobby administrative agencies in the executive branch which he did not work for 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 are not restricted under Section 87406 and Regulation 18746.1 from lobbying the Legislature, the Governor, or other state agencies since you did not work for or represent the Legislature and the BOC is not subject to the direction and control of the Governor as contemplated in Section 87406(d)(2). (*Eberle Advice Letter*, No. A-98-165.) Also, generally, a designated employee is not restricted by Section 87406 from lobbying the Legislature or Governor regarding legislation. (*Witherspoon Advice Letter*, *supra*; *Craven Advice Letter*, No. A-93-057.)

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 BOC, or any officer or employee of the BOC*, 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. Section 87406 and associated Regulation 18746.2 provides further details regarding that which

constitutes a formal appearance, attempts to influence a decision, and other definitions. A copy of that statute and regulation are enclosed.

For your information, 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. (See § 87406 and Regulation 18746.2.)

- II. *Under the provisions of sections 87400-87406, would you, as the Executive Director of the CPOC, be restricted in any activities or communications with the BOC, the Legislature or other state agencies as those activities or communications may relate to training of probation staff, monitoring compliance with standards concerning juvenile halls, ranches and camps and of training programs for probation staff, and revision of those standards?*

*Are These Judicial Proceedings and Did You Participate in Them?*

It has been established above that you are a "state administrative official" subject to the provisions of 87400 et seq. As fully discussed above, sections 87401 and 87402 prohibit you from influencing any judicial, quasi-judicial, or other proceeding in which you participated while in state service. (Regulation 18741.1, subdivision (a)(4).)

You indicate in your additional request for advice dated March 14, 2000, that you were responsible for providing several counties and county agencies technical assistance and monitored their compliance with state regulations with respect to jails and juvenile facilities. You also did the same with respect to a statewide training program for probation and correctional officers. The proceedings involving monitoring compliance clearly are of the nature contemplated above in Regulation 18741.1. Your monitoring and advisory activities are "supervisory" in nature and your determinations regarding compliance or non-compliance with applicable regulations or other laws constitutes personal and substantial involvement in a governmental decision. Accordingly, you have participated in judicial proceedings in your duties prior to September 1996.

Applying sections 87401 and 87402, one can deduce that you are permanently banned from attempting to influence any proceeding involving the state and parties you advised with respect to the proceedings to monitor compliance. This ban applies to any future contact with the BOC and any other state agency. It is important to note, however, that this analysis is a very

fact-dependent one, necessarily. Therefore, you are encouraged to seek advice in the future with respect to specific scenarios should you find additional guidance necessary.

As explained above, the one-year ban prohibits a former state employee, for a period of one year after leaving state service, from being paid to influence his or her former state agency either orally or in writing. (See Regulation 18746.2.) The prohibition applies to communications made for the purpose of supporting, promoting, influencing, modifying, opposing, delaying or advancing the agency's action or proceeding. Insofar as your question suggests you would be required as Executive Director of the CPOC to also contact the BOC with respect to regulatory standards involving the training programs or the jails or juvenile facilities, you would be prohibited from doing so for one year. You would not be prohibited pursuant to the one-year ban from contacting the Legislature or other state agencies because the one-year ban applies only to one's former employer as discussed below.

III. *As a Field Representative for the Board of Corrections, if the provisions of section 87406(d)(1) are applicable to you, and you leave state employment and obtain compensated employment as Executive Director with the CPOC, an affiliate organization of the California State Association of Counties ("CSAC"), will you face restrictions in communication with staff from the Board of Corrections, the Department of Corrections, the California Youth Authority and the Youth and Adult Correctional Agency?*

As shown above, you are subject to the one-year ban on certain activities as set forth in section 87406 of the Government Code. The next issue to be determined is to which entity or entities this one-year ban shall apply. Specifically, you ask what restrictions, if any, will apply to you in your capacity as Executive Director with CPOC with respect to not only the Board of Corrections but also the Department of Corrections, the California Youth Authority and the Youth and Adult Correctional Agency. 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.) However, whether an agency is provided technical assistance or legal advice, or is subject to oversight by another agency pursuant to state law, are not factors to be considered in determining whether an agency is subject to the direction and control of another. (§ 87406, subd.(d)(1); Regulation 18746.1, subd.(b)(6).)

The Board of Corrections is a department of the Youth and Adult Correctional Agency. (Penal Code § 6024.) The Board of Corrections' membership is composed of 13 members, one of whom is the Secretary of the Youth and Adult Correctional Agency, the directors of the California Youth Authority and the Department of Corrections, and ten other members appointed by the Governor. (Penal Code § 6025.)

In determining which agency an employee or officer "worked for or represented," we have advised that an official did not work for or represent the Governor where he merely participated in the budget process as an advisor. (*Gould* Advice Letter, *supra*.) We have also

advised that an employee did not work for or represent regional boards where he did not work with or advise them. (*Grimm* Advice Letter, No. I-96-114.) Another employee did not work for the Governor's office where he was merely on loan during a brief transition period ending his state employment. (*Wright* Advice Letter, No. A-96-277.)

In determining which is an official's state administrative agency, we have applied a pyramid concept. (*Monagan* Advice Letter, No. A-93-473.) That concept was codified in section 87406. In the *Monagan* Advice Letter, the facts were that a statute established three distinct Occupational Safety and Health agencies under the Department of Industrial Relations, each with different duties. We advised that the prohibition was limited to one of those agencies, the former board that employed the official. While the three entities in *Monagan* are within the same department (Industrial Relations), they function as separate entities and "are, in effect, separate departments unto themselves."

In your case, the BOC's membership consists of, among others, the Secretary of YACA and the directors of the CYA and DOC. As in *Monagan*, the BOC, CYA and DOC are "sibling" departments under YACA, by which we mean none of the departments is under the direction or control of either of the other two, and all three share the same parent, YACA. While the respective chiefs of these other departments may sit on the BOC, they do so not as directors of their own agencies but as members of the BOC. You have provided no evidence YACA, or the other two agencies (CYA and DOC) in any way review the decisions of the BOC or otherwise exercise authority over the board (with the obvious exception that YACA, as the parent agency, has budgetary responsibilities for its various departments, an aspect not relevant here). Nor have you indicated that you advised the CYA or DOC. Therefore, for the purposes of the one-year ban in section 87406(d)(1), the "agency" for which you worked for the last 12 months is the BOC alone and not the CYA, DOC or YACA.

#### **IV. Decisions Relating to Prospective Employers**

Section 87407 of the Act sets forth the rules relating to the actions of certain public officials *vis a vis* their prospective employment. Section 87407 provides:

"No state administrative official, elected state officer, or designated employee of the Legislature shall make, participate in making, or use his or her official position to influence, any governmental decision directly relating to any person with whom he or she is negotiating, or has any arrangement concerning, prospective employment."

The Commission adopted Regulation 18747 (copy enclosed) to interpret Section 87407. Under subdivision (c) of Regulation 18747, a person is a *prospective employer* of a public official if the official, either personally or through an agent, is negotiating or has an arrangement concerning prospective employment with that person. Regulation 18747(c) further defines "negotiating" and an "arrangement concerning prospective employment" as follows:

"(1) A public official is "negotiating" employment when he or she interviews or discusses an offer of employment with an employer or his or her agent.

(2) A public official has an "arrangement" concerning prospective employment when he or she accepts an employer's offer of employment.

(3) A public official is not "negotiating" or does not have an "arrangement" concerning prospective employment if he or she rejects or is rejected for employment."

Under subdivision (b) of the regulation, a governmental decision will *directly relate* to a prospective employer if the public official knows or has reason to know that the prospective employer is "directly involved" in the decision,<sup>3</sup> or it is reasonably foreseeable that the financial effect of a decision on a prospective employer is material.<sup>4</sup>

Your request for advice does not indicate whether you are negotiating employment with CSAC or are merely considering doing so. Nevertheless, we feel you should be aware of the law in this regard and your obligations thereunder.

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<sup>3</sup> Regulation 18747 provides that the definition of the term "directly involved" is the one set forth in Regulation 18704.1(a):

"(a) A person, including business entities, sources of income, and sources of gifts, is directly involved in a decision before an official's agency when that person, either directly or by an agent:

(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

(2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person."

<sup>4</sup> The materiality standards of Regulations 18705.1(b), 18705.3(b)(2) and 18705.3(b)(3) are used in Regulation 18747. Copies of these regulations are enclosed.

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

Sincerely,

Luisa Menchaca  
Assistant General Counsel

*Scott Tocher by blw*

By: Scott Tocher  
Staff Counsel, Legal Division

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Enclosures