



FAIR POLITICAL PRACTICES COMMISSION

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August 6, 2003

Loy Holder
9468 Lockeridge Way
Sacramento, CA 95829

**Re: Your Request for Advice
Our File No. A-03-168**

Dear Mr. Holder:

This letter is in response to your request for advice regarding the post-employment provisions of the Political Reform Act (the "Act").¹ Our advice is based on the facts presented; the Commission does not act as a finder of fact when it provides advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

QUESTION

May you, as an employee of a contractor to be selected by the Health and Human Services Data Center ("Data Center"), accept an assignment to the Data Center, your former state administrative agency employer, in order to work under the contract that will then exist between the Data Center and your new employer?

CONCLUSION

Yes. Although you are subject to the one-year and permanent bans under the Act's post-employment provisions, since you did not previously participate in your capacity as a state administrative official in the contract to be executed between your new employer and the Data Center, the permanent ban does not prohibit you from participating, on behalf of your new employer, in the implementation of this contract. Similarly, since you will be administering, implementing, or fulfilling the provisions of what will be an existing contract, the one-year ban does not prohibit you from undertaking these actions on behalf of your new private employer.

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

FACTS

You retired from state service on July 1, 2003. Prior to your retirement, you were employed by the State of California as a senior information systems analyst with the Data Center. In that capacity, you acted as a lead in the design, testing and implementation of various system enhancements to the Welfare Data Tracking and Implementation Project ("WDTIP"). You anticipate that the Data Center will contract for a private contractor to provide the services you formally performed in connection with the WDTIP. However, you have not, and will not, have any part in arranging for or securing that contract. Once a contractor is retained by the data center, you anticipate seeking employment with the contractor to perform part-time work on WDTIP project, doing essentially the same work as you did prior to your retirement.

ANALYSIS

State administrative officials² who leave state service are subject to two types of post-governmental employment restrictions under the Act.³ The first is a permanent prohibition on advising or representing any person for compensation in any judicial or other proceeding (including contracts) in which the official participated while in state service. (Section 87401 and section 87402.) The second is a one-year ban on making any appearance for compensation before your former agency, or officer or employee thereof, for the purpose of influencing any administrative, legislative or other specified action (including contracts). (Section 87406.)

Permanent Ban

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 aiding, advising, counseling, consulting, or assisting in representing any other person, for compensation, regarding that same proceeding. A "judicial, quasi-judicial or other proceeding" includes a contract or other particular matter involving a specific party or parties in any court or state administrative agency. (Section 87400(c).) An official is considered to have "participated" in a contract proceeding if the official was personally and substantially involved in the contract. (Section 87400(d).)

The Commission considers the negotiating, drafting, and awarding of a contract to be a separate proceeding from the monitoring and performance of the contract. (*Blonien* Advice Letter, No. A-89-463.) You indicate that your work at the Data Center concluded

² A "state administrative official" is defined in section 87400(b) as "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." FTB is a state administrative agency as defined in section 87400(a). As a consultant for FTB, you were a state administrative official.

³ In addition, prior to separation from state service, a state administrative official is prohibited under section 87407 from making, participating in making, or influencing "any governmental decision directly relating to any person with whom he or she is negotiating, or has any arrangement concerning, prospective employment." (Regulation 18747.)

prior to the contracting out of your former position, a contract which has not yet been awarded. This means your work, when in state employment, occurred and concluded prior to the future awarding of the contract and that you had no role, as a state administrative official with the Data Center, in designing, administering or implementing the contract. Thus, the permanent ban would not apply to you with respect to implementation of this new contract.

One-Year Ban

The Act prohibits an employee designated under his/her agency's conflict of interest code, or an employee that makes or participates in making governmental decisions, 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, or contract, or the sale or purchase of goods or property." (Section 87406(d)(1).) "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." (Regulation 18746.2.)

Not all communications to a former state administrative agency employer are prohibited by the one-year ban; it is only when the communication is for the "purpose of influencing administrative or legislative action, 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," that the communication is prohibited by the one-year ban. (Section 87406(d)(1); regulation 18746.1(b)(5).) An appearance or communication "is for the purpose of influencing if it is made for the principal purpose of supporting, promoting, influencing, modifying, opposing, delaying, or advancing the action or proceeding." (Regulation 18746.2(a).) In contrast, an appearance or communication made as part of "[s]ervices performed to administer, implement, or fulfill the requirements of an existing permit, license, grant, contract, or sale agreement may be excluded from the [one-year] prohibitions... provided the services do not involve the issuance, amendment, awarding, or revocation of any of these actions or proceedings." (Regulation 18746.1(b)(5)(A); *Hanan* Advice Letter, No. I-00-209; *Billeci* Advice Letter, No. I-00-234; *Hamilton* Advice Letter, No. I-99-159.)

If you become an employee of a contractor to the Data Center and are assigned to work on the WDTIP pursuant to a newly executed contract with Health and Human Services, you indicate that your work and communications with personnel of the Data Center will be for the purpose of administering, implementing, or fulfilling the requirements of this then-existing contract. Provided that your work does not involve the issuance, amendment, awarding, or revocation of this contract, or of any other contract, permit, or license involving the Data Center, you will not be prohibited under the one-year ban from appearing before or communicating with the Data Center as an employee of the contractor selected to perform the work you describe.

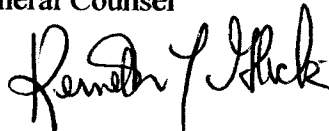
However, communications between you and the Data Center that are not made to administer, implement, or fulfill an existing contract, but are made for the purpose of influencing the legislative or administrative actions of the Data Center or of any of its organizational sub-units, are prohibited under the one-year ban.

For further guidance, we have enclosed a fact sheet regarding the post-governmental employment provisions of the Act.

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

Sincerely,

Luisa Menchaca
General Counsel



By: Kenneth L. Glick
Counsel, Legal Division

Enclosure
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