



## FAIR POLITICAL PRACTICES COMMISSION

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June 17, 2004

Richard A. Rogan  
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Two Embarcadero Center, 5<sup>th</sup> Floor  
San Francisco, CA 94111-3824

**Re: Your Request for Advice  
Our File No. A-04-109**

Dear Mr. Rogan:

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

### QUESTION

Is Mr. Evans prohibited by the post-employment provisions of the Act from appearing before his former state administrative agency employer, the California Public Utilities Commission ("CPUC"), in his capacity as a court-appointed receiver, in order to obtain CPUC approval of the court-ordered sale of the assets of a regulated water utility?

### CONCLUSION

The "one-year ban" prohibits Mr. Evans from appearing before or communicating with the CPUC in his capacity as a court-appointed receiver in order to obtain approval of the court-ordered sale and transfer of a water utility's assets. The courts are neither a state agency nor a local government agency, as defined by the Act. For this reason, an individual acting in a paid capacity to represent a court before the CPUC does not qualify under the exceptions to the one-year ban found in section 87406(e).

With respect to the permanent ban, it does not appear from the facts provided that the instant proceeding to obtain CPUC approval for the sale and transfer of water utility

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

assets is a proceeding in which Mr. Evans personally and substantially participated while in the employ of the CPUC. If such is the case, the permanent ban would not apply. In any event, since the courts are a constitutionally-recognized branch of California state government, Mr. Evans's appearances or communications in this regard will be on behalf of the State of California and for that reason, will not be subject to the "permanent ban."

## FACTS

Dean Evans retired from the CPUC on August 1, 2003. During his tenure at the CPUC, he served as director of the water division and thereafter as an administrative law judge.

Following retirement from the CPUC, Mr. Evans was appointed by the Superior Court of California for the County of Monterey ("Court") as a receiver in the matter of Alisal Water Corporation, doing business as Alco Water Service ("Alco"). Among other things, the Court is requiring Mr. Evans to transfer and sell certain assets belonging to Alco. Pursuant to section 851 of the Public Utilities Code, the transfer and sale of these assets is subject to the prior approval of the CPUC. (*Hempy v. Public Utilities Commission* (1961) 56 Cal.2d 214.)

## ANALYSIS

State administrative officials<sup>2</sup> who leave state service are subject to two types of post-governmental employment restrictions under the Act:

- A "one-year ban" prohibiting a state employee from communicating with his or her former agency to influence the agency's administrative or legislative action (section 87406); and
- A "permanent ban" barring a state employee from "switching sides" in any specific proceeding on which the employee worked while in state service (sections 87400-87405).

### A. The One-Year Ban

Section 87406(d)(1) states in pertinent part:

"No designated employee of a state administrative agency, any officer, employee, or consultant of a state administrative agency who holds a position which entails the making, or participation in the making, of decisions which may foreseeably have a material effect on any financial interest, and no member of a state administrative agency, for a period of

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<sup>2</sup> 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."

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 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.”

In his capacity as an administrative law judge and as director of the CPUC’s water division, Mr. Evans served in positions designated in the CPUC’s conflict of interest code.<sup>3</sup> In addition, he is being compensated for his duties as a court-appointed receiver, including any appearances or communications which he might make before the CPUC. These appearances and communications, if made, would be for the purpose of obtaining the CPUC’s approval for the sale and transfer of certain Alco assets. As such, these appearances and communications will be for the purpose of influencing an 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).) Thus, unless an exception applies, Mr. Evans is prohibited by the one-year ban from appearing before or communicating with the CPUC, in his capacity as a court-appointed receiver, for the purpose of obtaining the CPUC’s approval for the sale and transfer of assets belonging to Alco.

The exceptions to the one-year ban are found at section 87406(e):

“(e) The prohibitions contained in subdivisions (b), (c), and (d) shall not apply to any individual subject to this section who is or becomes any of the following:

(1) An officer or employee of another state agency, board, or commission if the appearance or communication is for the purpose of influencing legislative or administrative action on behalf of the state agency, board, or commission.

(2) An official holding an elective office of a local government agency if the appearance or communication is for the purpose of influencing legislative or administrative action on behalf of the local government agency.”

The Commission has long held that the courts are not considered under the Act to be either local government agencies, as defined in section 82041, or state agencies, as defined in section 82049. (*In re Baty* (1979) 5 FPPC Ops. 10; *Vickrey* Advice Letter, No. I-99-021; *Gomez* Advice Letter, No. A-99-068.) Thus, the exceptions at section 87406(e)

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<sup>3</sup> This information was provided in a telephone conversation with Commission staff.

do not apply to Mr. Evans when acting in his capacity as a court-appointed receiver. He is prohibited by the one-year ban from appearing before his former state administrative agency employer, the CPUC, in connection with a request for the CPUC's approval to sell and transfer assets currently owned by Alco.

### **B. The Permanent Ban**

Sections 87401 and 87402 (collectively, the "permanent ban") prohibit a former state administrative official from advising or representing any person, other than the State of California, for compensation in any judicial, quasi-judicial or other proceeding in which the official participated while in state service, or from assisting another who will engage in this activity. An official is considered to have "participated" in a proceeding if he or she took part in the proceeding "personally and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation or use of confidential information...." (§ 87400(d).)

The permanent ban in sections 87401 and 87402 applies only to judicial, quasi-judicial, or other proceedings before any court or state administrative agency in which a former employee participated while at his or her former agency. Section 87400(c) defines "judicial, quasi-judicial or other proceeding" to include:

"...any 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."

An application for approval to sell and transfer assets of a public utility is a particular matter involving a specific party or parties before a state administrative agency (i.e., the applicant and the public utility currently owning the assets) and involves a request for a ruling or other determination with respect to a proposed disposition of assets. Thus, a request for CPUC approval to sell and transfer assets currently owned by Alco will comprise a "judicial, quasi-judicial or other proceeding" to which the permanent ban may potentially apply. However, if a request for such approval is a new proceeding and will not be considered in connection with any other proceeding in which Mr. Evans previously participated personally and substantially, either directly or in connection with his supervisory responsibilities as director of the CPUC's Water Division, the permanent ban would not apply.

Significantly, the permanent ban is not triggered when a former state administrative official's appearance in a proceeding is on behalf of the State of California. Although the Act does not define, for purposes of the permanent ban, what organizational units of government may be identified as "the State of California," the California State Constitution recognizes that the state's government is comprised of three separate components: the executive branch, the Legislature, and the judiciary. Thus,

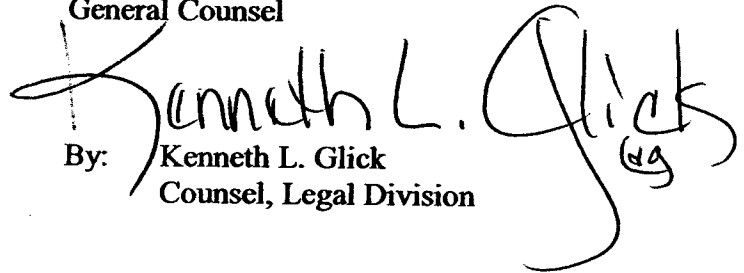
broadly invoking the State of California as a client would necessarily include the courts, as organs of the judiciary. In other words, a "state agency" as defined under section 82049 is a narrower definition - a classification consisting of a subunit of state government - as opposed to the permanent ban's statutory reference to the State of California, which refers to the state government as a whole.

In light of the above, Mr. Evans is acting as a representative on behalf of the State of California when performing his official duties as a court-appointed receiver. Thus, when acting in this capacity he is not subject to the permanent ban.

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

Sincerely,

Luisa Menchaca  
General Counsel

Handwritten signature of Kenneth L. Glick in black ink. The signature is written in a cursive style and includes the initials 'KG' at the end.

By: Kenneth L. Glick  
Counsel, Legal Division

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