



## FAIR POLITICAL PRACTICES COMMISSION

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March 25, 2005

Bruce B. Hancock  
2215 Boyer Drive  
Carmichael, California 95608

**Re: Your Request for Advice  
Our File No. A-05-007**

Dear Mr. Hancock:

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

### QUESTIONS

1. Does the one year prohibition in section 87406 restrict your ability to appear before the State Allocation Board?
2. Does the one year prohibition in section 87406 restrict your ability to appear before the Office of Public School Construction after you leave state service?
3. Does the one year prohibition preclude you from appearing before the legislative members of the State Allocation Board?

### CONCLUSIONS

1. Yes. For a period of one year after you leave state employment, you may not appear or in any way represent any other person for compensation, through oral or written communication, before the State Allocation Board or its officers or employees, for the purpose of influencing administrative or legislative action.
2. No. Section 87406 does not restrict your ability to appear before the Office of Public School Construction.

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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.

3. Yes. Section 87406 would preclude you from lobbying the legislative members of the State Allocation Board.

### FACTS

In the correspondence dated January 18, 2005 and our telephone call of February 9, 2005, you indicated that just prior to your retirement on January 31, 2005, you were the Assistant Executive Officer of the State Allocation Board ("SAB"). The SAB and your position are both authorized by Government Code section 15490. You indicated that the SAB is comprised of six legislators: currently those are State Senators Tom Torlakson, Bob Margett, one senate vacancy, and Assemblymembers Jackie Goldberg, Lynn Daucher, one Assemblymember vacancy, the Directors of the Departments of Finance and General Services, the Superintendent of Public Instruction, and the Governor's appointee David Sickler.

The SAB is responsible for allocating mostly state bond funds to school districts for facility-related purposes. The legislative members have the same voting rights as the other members. Your performance evaluations have always been provided by the Chair of the SAB. You were an exempt employee of the SAB. In this role, you were responsible for advising the board members regarding legislation or policy related to school facilities.

Presumably because the SAB receives assistance from the Office of Public School Construction ("OPSC"), you have provided us information about the OPSC and have inquired as to whether the one year prohibition in section 87406 restricts your ability to appear before the OPSC as well.<sup>2</sup>

As background, you explain that Government Code section 15504 provides that the Director of General Services is to provide assistance to the SAB in performing administrative functions for the SAB. You describe the OPSC as the instrument by which the Director of General Services provides assistance to the SAB.<sup>3</sup>

You are considering employment directly (or as a self-employed consultant) for school districts and/or others involved in school facilities issues, in a capacity that would involve school facility funding and working with state government.

### ANALYSIS

Your inquiry concerns your post-employment obligations under the Act, colloquially known as the "revolving door" prohibitions. The Act places certain

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<sup>2</sup> We assume that you do not work for OPSC since you indicated that your position has never been included in the organization charts for OPSC.

<sup>3</sup> Specifically, you state that Government Code Section 14620 authorizes a position within the Department of General Services for an Executive Officer of the OPSC.

restrictions on individuals who have recently left state service and who wish to use the expertise and relationships they developed at their former agency for compensation by third persons. Although you have only requested information regarding the one-year ban, you should also be aware that there is a permanent ban on "switching sides." Before answering your questions regarding the one-year ban, or "revolving door" prohibitions, we explain your obligations and restrictions under the permanent ban.

**A. The permanent ban on "switching sides."**

Public officials who leave state service are subject to two types of post-employment<sup>4</sup> restrictions under the Act. The first is a permanent prohibition on representing, for compensation, any other person in any judicial, quasi-judicial, or other proceeding in which the administrative official participated while in state service. (Sections 87401 and 87402; Reg. 18741.1.) In other words, a public official may never "switch sides" in a proceeding<sup>5</sup> after leaving state service. Since you do not mention a specific factual circumstance where these sections may apply, we urge you to take note of sections 87400-87405 in their entirety. We will discuss certain aspects of those sections here.

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,

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<sup>4</sup> In addition, the Act includes a "pre-post employment" restriction on influencing prospective employment while still a public official. (Section 87407; Reg. 18747.)

<sup>5</sup> "Judicial, quasi-judicial or other proceeding" means 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." (Section 87400(c); see Regs. 18741.1, subd.(a)(3) and 18202.)

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.)

In brief, sections 87401 and 87402, and regulation 18741.1, prohibit state administrative officials from leaving state service and acting in ways that might affect the outcome of proceedings that official previously participated in while working for the state.

You were a state administrative official. (Section 87400(b).) Therefore, the permanent ban of sections 87401 and 87402 precludes you from “switching sides” with regard to judicial, quasi-judicial, or other proceedings before any court or state administrative agency in which you participated while at your former agency. Section 87400(a) expressly defines “state administrative agency” to exclude the Legislature. (*Sanford Advice Letter*, No. A-85-182.)

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.”

Under section 87400(c), a “proceeding” includes any particular matter involving a specific party or parties in a state administrative agency. (See Reg. 18741.1, subd.(a)(4).) Regulatory activities are not considered “proceedings” within the meaning of section 87401 if they only involve the formulation of rules of general application to be applied prospectively and not the rights or claims of specific parties. (*Witherspoon Advice Letter*, No. A-94-371; *Chalfant Advice Letter*, No. A-92-509.) Sections 87401 and 87402 do not restrict an ex-employee’s ability to participate in *new* proceedings. (*Leslie Advice Letter*, No. I-89-649.)

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 . . .” (Section 87400(d); see Reg. 18741.1, subd.(a)(4).) This covers any proceeding, as defined above, in which any employee has actually participated while at his or her former agency, as well as any proceeding which he or she supervised. (*Brown Advice Letter*, No. A-91-033; see Reg. 18741.1, subd.(a)(4).)

Under sections 87400-87402, the prohibition applies if participation is for compensation. Commission staff has advised that a former official cannot escape the

prohibitions of section 87406 by charging one's client for some activities, but not others. (*Weil* Advice Letter, No. A-97-247.) The same general rule applies in the context of sections 87400-87402.

Where the State of California is a party, the prohibition does not apply. 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 the provisions of sections 87401 and 87402 do not prevent a former state administrative official who has left his or her state employment 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.)

#### **B. 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 influencing<sup>6</sup> administrative or legislative action,<sup>7</sup> 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 agency does not include an appearance in a court of law, before an administrative law judge, or

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<sup>6</sup> “Influencing legislative or administrative action” includes influencing by any means, including but not limited to the provision or use of information, statistics, studies or analyses. (Section 82032; see Regs. 18746.2, 18702.3 and 18702.4, subd.(b).) “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. . . .”

<sup>7</sup> 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 any bill.

before the Workers' 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." (*Ibid.*; see Regs. 18741.1, 18746.1, 18746.2.)

Generally, a designated employee's state administrative agency means the agency he or she worked for or represented and any board or commission under the agency's control. (*Parker* Advice Letter, *supra*; *Grimm* Advice Letter, No. I-96-114; *Gould* Advice Letter, No. A-96-077.) You have not indicated that you represented any agency other than the SAB.

Under section 87406, representation must be for compensation and on behalf of another person. (Reg. 18746.1, subs.(b)(3) and (b)(4); *Reames* Advice Letter, No. I-91-289; *Simonian* Advice Letter, No. I-94-001.) This definition of "person" has been construed to include public agencies, including local government agencies. (*In re Witt* (1975) 1 FPPC Ops. 1; *Parker* Advice Letter, No. A-98-031; *Evans* Advice Letter, No. I-86-117.)

Based upon the foregoing analysis, you may not, for 12 months following your retirement, act as a compensated<sup>8</sup> representative or agent for any person *before the SAB or any officer or employer thereof* 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. (See Section 87406; Regs. 18741.1, 18746.1, 18746.2.) This would preclude you from influencing any of the members of the SAB, including the legislative members, regarding administrative or legislative action.

We now examine whether, for purposes of applying section 87406, the one-year ban prohibits you from acting as a representative or agent before government units other than the SAB. For purposes of applying section 87406, your state administrative agency is deemed to also include those governmental units that provide board members and/or assistance for the SAB, i.e., the Department of Finance, the OPSC, the Department of General Services, and/or the Superintendent of Public Schools.

The Department of General Services is required by Government Code section 15504 to provide the SAB with any assistance it needs in order to carry out its duties. The OPSC provides this assistance. However, the Government Code section does not go so far as to place the Department of General Services or OPSC under the control of the SAB. Moreover, the Department of Finance (where the OPSC is located), the Department of

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<sup>8</sup> Again, Commission staff has held that you cannot escape the prohibitions of Section 87406 by charging your client for some activities, but not others. (*Weil* Advice Letter, *supra*.)

General Services, and the Superintendent of Public Schools are all independent state agencies. Therefore, we conclude that the Department of General Services, the Department of Finance, the OPSC, and the Superintendent of Public Schools are not under the SAB's control. (*Grimm* Advice Letter, *supra*; *Burroughs* Advice Letter, No. A-97-290; *Monagan* Advice Letter, No. A-93-473.)

We have advised that 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 did not restrict a former official from assisting or advising other attorneys in the official's law firm or clients themselves who might appear before or communicate with the official's former agency regarding a regulation or legislation under consideration as long as the former official was not identified in connection with the appearance or communication. (*Ordos* Advice Letter, No. A-95-052.) Communications with an agency that are not for the purpose of influencing administrative or legislative action are not restricted by section 87406. For example, an ex-employee can attend informational meetings with the agency, or request information from the agency concerning existing laws, regulations, or policies, as long as the employee does not attempt to influence administrative or legislative action. (See *Bagatelos* Advice Letter, No. I-91-202; Regs. 18746.2, 18202.)

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

Certain other informal contacts may not be considered influencing. For example, an ex-employee may request information concerning anything that is a matter of public record, such as existing laws, regulations, or policies. (Reg. 18746.2, subd.(b)(3); *Tobias* Advice Letter, No. I-96-089; *Harrison* Advice Letter, *supra*.) Further, an ex-employee may attend informational meetings or public forums if the attendance is not for the purpose of influencing agency actions. (Reg. 18746.2, subs.(b)(1) and (b)(2); *Craven* Advice Letter, No. A-93-057.) Social conversations are also not considered influencing if the conversation is not intended to influence administrative or legislative action. (*Tobias* Advice Letter, *supra*.)

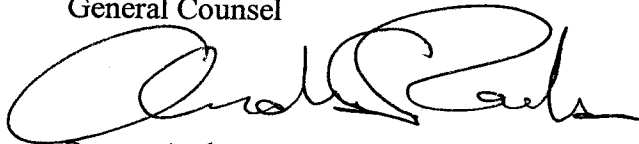
Whether a particular meeting or conversation is for the purpose of influencing legislative action will depend on the individual facts of the case. For instance, if an employee attends a public meeting with numerous other attendees where there are several topics discussed, it may be possible to infer that mere 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 be inferred that the ex-employee's mere presence at the meeting is intended to influence agency action. Therefore, whether the ex-employee may attend such a meeting depends greatly on the facts of that particular meeting and the ex-employee's intentions in attending the meeting.

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

Sincerely,

Luisa Menchaca  
General Counsel

A handwritten signature in black ink, appearing to read "Andreas C. Rockas". The signature is fluid and cursive, with a large initial "A" and "R".

By: Andreas C. Rockas  
Staff Counsel, Legal Division

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