



FAIR POLITICAL PRACTICES COMMISSION

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December 7, 2006

James Hale
Construction Supervisor
Industrial Services Division
Prison Industry Authority
P.O. Box 6990
Folsom, CA 95763-6990

RE: Your Request for Informal Assistance
Our File No. I-06-214

Dear Mr. Hale:

This letter is in response to your request for advice regarding the post-governmental employment provisions of the Political Reform Act (the "Act").¹ Since you have not provided any facts related to a specific appearance before or communication with your previous government agency employer, we are treating your request as one for informal assistance.² This letter should not be construed as assistance on any conduct that may have already taken place. (See regulation 18329(b)(8)(A).) In addition, this letter is based on the facts presented. The Fair Political Practices Commission (the "Commission") does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

QUESTION

Do the post-governmental employment provisions of the Act prohibit you from working on the installation or maintenance of the Prison Industry Authority's (the "PIA") wastewater-recycling systems?

CONCLUSION

Providing that your future private sector employment is limited to the physical labor of installing and maintaining the PIA's wastewater-recycling systems, the post-

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

² Informal assistance does not provide the requester with the immunity provided by an opinion or formal written advice. (Section 83114; regulation 18329(c), copy enclosed.)

governmental employment provisions of the Act are not applicable to your particular circumstances.

FACTS

You were previously employed as a Construction Supervisor I with the Industrial Services Division of the PIA. You retired from this position on November 30, 2006. As an employee of the PIA, you supervised the onsite installation of two wastewater-recycling systems installed by a private sector company. While you had no role in negotiating the contract between the PIA and the private sector company, you did have some responsibility in accepting the system as installed.

You have contacted and discussed future employment with this private sector company. While the company sells, installs, and maintains wastewater-recycling systems, you have provided that your potential position with the company will be limited to the "hands-on work" of the installation or maintenance of systems. Additionally, you state that you will be making no sales contacts or negotiations with the PIA.

In a telephone conversation on November 21, 2006, you further stated that your position with the PIA was not a designated position in the agency's conflict-of-interest code and that you were not required to file an annual statement of economic interests with the Commission. Furthermore, you explained that the potential position with the private sector company will be limited to the physical labor of installing and maintaining wastewater-recycling systems and that, while you may make casual contacts with employees of the PIA if assigned to work on a PIA systems, the position would not entail making any recommendations to the PIA or its employees regarding the systems.

ANALYSIS

Public officials who leave state service are subject to two types of post-governmental employment provisions under the Act, colloquially known as the "revolving door" prohibitions.³ In addition, section 87407 prohibits certain state and local officials from making, participating in making, or using their official position to influence decisions affecting persons with whom they are negotiating employment, or has any arrangement concerning employment. (Section 87407; regulation 18747.)⁴

³ A comprehensive discussion of the elements of the two laws is set forth in the attached "Leaving Your State Job? Post-Employment Restrictions May Affect You." We have enclosed this document for your information. We do not repeat this information in the body of this letter.

⁴ According to the facts you have provided, you negotiated employment with the private sector company while employed by the PIA. Any advice issued at this time pertaining to section 87407 would relate to past conduct. As the Commission will not advise with respect to past conduct, we provide no opinion as to the application of section 87407 to your particular circumstances.

- **Permanent Ban:** The first restriction is the "permanent ban" prohibiting a former state employee from "switching sides" and participating, for compensation, in any specific proceeding involving the State of California or assisting others in the proceeding if the proceeding is one in which the former state employee participated while employed by the state (see sections 87401-87402, regulation 18741.1).

The permanent ban is a lifetime ban and applies to any formal or informal appearance or any oral or written communication made with the intent to influence a judicial, quasi-judicial, or other proceeding in which you participated while serving as a state administrative official. (Section 87401.) "'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" (Section 87400(c).) Additionally, 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).)

From the facts you have provided, you supervised the onsite installation of two waste-water systems installed by the private sector company while employed by the PIA and had some responsibility in accepting the systems as installed. Under, the Act the contract between the PIA and the private sector company is considered a "proceeding" involving a specific party, and it appears that you have "participated" in this proceeding by rendering a decision or approval of the system as installed. Accordingly, the Act's permanent ban would prohibit you from making any appearance before or communication with any officer or employer of any state administrative agency for the purpose of influencing, as defined in regulation 18746.2, the proceeding in which you previously participated. (Regulation 18741.1(a)(3).) Generally, regulation 18746.2 provides that an appearance or communication is for the purpose of influencing if "made for the principal purpose of supporting, promoting, influencing, modifying, opposing, delaying, or advancing" an action or proceeding.⁵

According to the facts you have provided, your position would be limited to the physical labor of installing and maintaining systems. You may make "casual contacts" with PIA employees if assigned to work on a PIA system. However, your work would not entail making any recommendations to the PIA or its employees regarding the system. While the extent of your "casual contacts" with PIA employees is unclear, so long as your contacts with the PIA are not for the principal purpose of supporting,

⁵ Moreover, regulation 18746.2 provides that "[a]n appearance or communication includes, but is not limited to, conversing in telephone or in person, corresponding with in writing or by electronic transmission, attending a meeting, and delivering or sending any communication."

promoting, influencing, modifying, opposing, delaying, or advancing an action or proceeding, your contacts with the PIA would not be prohibited under the permanent ban.

- **One-Year Ban:** The second restriction is the “one-year ban” prohibiting a state employee from making an appearance or communicating, for compensation, before or with his or her former agency for the purpose of influencing certain administrative or legislative action or influencing certain proceedings. (See section 87406, regulation 18746.1.)

The one-year ban applies to employees who are designated in their former agency’s conflict-of-interest code. However, the one-year ban also applies to employees who made or participated in the making of governmental decisions that had a reasonably foreseeable material effect on any financial interest. In other words, the one-year ban applies to former employees who *should have been designated* in their former employer’s code. (Section 87406(d)(1); regulation 18746.1(a)(2).)⁶

The one-year ban prohibits former state employees from making appearances before or communications with their former agency employer only if an appearance or communication is made for the purpose of influencing, as defined in regulation 18746.2, any administrative or legislative action or any discretionary act involving the issuance, amendment, awarding, or revocation of a permit, license, grant or contract, or the sale or purchase of goods or property. (Regulation 18746.4(a)(5).) According to the facts you have provided, your position would be limited to the physical labor of installing and maintaining systems. So long as your “casual contacts” with employees of the PIA do not run afoul of regulation 18746.2, as discussed above, your contacts with the PIA would not be prohibited under the one-year ban.⁷

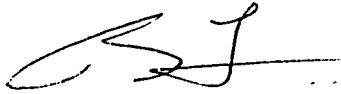
⁶ Section 87302 requires agencies to enumerate positions which involve the making or participating in the making of decisions which may foreseeably have a material effect on any financial interest. If the PIA properly made a determination that your position should not be included in its conflict-of-interest code, pursuant to the requirements of section 87302, the one-year ban would not apply to you.

⁷ We note that other bodies of law may also be implicated by your proposed employment. For example, Government Code section 19990 allows each state agency to develop a statement of incompatible activities, which includes specific enterprises or employment “clearly inconsistent, incompatible, in conflict with, or inimical to” the duties of the agency’s officials and employees. As we do not offer advice beyond the confines of the Act, we must refer you to the PIA’s counsel and statement of incompatible activities for further details.

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

Sincerely,

Luisa Menchaca
General Counsel



By: Brian G. Lau
Counsel, Legal Division

Enclosures
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