



FAIR POLITICAL PRACTICES COMMISSION

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December 20, 2006

Mr. Richard Kai
899 Shore Breeze Drive
Sacramento, CA 95831

**RE: Your Request for Informal Assistance
Our File No. I-06-217**

Dear Mr. Kai:

This letter is in response to your request for advice regarding the post-employment provisions of the Political Reform Act (the "Act").¹ Our assistance is based on the facts presented in your request and your telephone conversation with Fair Political Practices Commission ("Commission") staff on December 13, 2006. As your request seeks general assistance and does not provide specific information about particular consulting contracts, proceedings or appearances, we are treating your request as one for informal assistance.²

QUESTION

You ask whether the post-employment provisions of the Act place any restrictions on your current consulting work at the audit, tax and advisory firm KPMG, considering that you are retiring from the Administrative Office of the Courts ("AOC"), a state judicial branch agency, and that you previously were employed with two state Executive branch agencies, the Department of the Youth Authority and the Department of Education.

CONCLUSION

The Act's one-year ban prohibiting employees of state administrative agencies from appearing before or influencing their former agency after leaving office, is not applicable to you because the AOC from which you are retiring is an agency in the judicial branch of government and not a "state administrative agency" as defined in section 87400(a). For the same reason, the Act's permanent ban on working on the other side of a specific proceeding which you worked on as an employee of a "state

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 requestor with the immunity provided by an opinion or formal written advice. (Regulation 18329, subd. (c).)

administrative agency” will not apply to matters you worked on at the AOC. The permanent ban will, however, apply to proceedings you worked on at the Department of Youth Authority and the Department of Education.

In addition, you stated in your request for advice, that the office of the General Counsel of the AOC has informed you of post-employment provisions of the California Rules of Court applicable to your conduct after leaving the AOC. These rules are outside the jurisdiction of the FPPC to advise upon.

FACTS

You have recently left your position as Assistant Director of Finance for the AOC. You physically left the AOC on Labor Day weekend and since that time have not been working there in any capacity. You are exhausting your annual leave balance at the AOC and so you remain on active employment status with the agency through approximately March 19, 2007. Once your annual leave balance is exhausted, your retirement from state government service will become official.

You began working in the risk advisory services department at KPMG, a private auditing and consulting firm, on November 6, 2006. The Sacramento office of KPMG conducts the majority of its state business with the departments and agencies within the Executive Branch. KPMG has one contract with the AOC on the judicial side of state government.

Prior to joining the AOC, you were employed by the Department of Youth Authority, a department that was absorbed into the Department of Corrections, from January 1998 to November 3, 2004. Before taking the position at the Department of Youth Authority, you worked for the Department of Education for 17 years from April 1980 to December 1998. In both of these positions, you were a gubernatorial appointee, serving in a Career Executive Assignment (“CEA”) exempt position.

Working now at KPMG, you are requesting advice about post-employment provisions of the Act that may affect your consulting with departments or agencies within the Executive branch of state government.

ANALYSIS

The Act has three main post-governmental restrictions on individuals who have recently left state service:

1. A “one-year ban” prohibiting a state employee from communicating, for compensation, with his or her former agency for the purpose of influencing certain administrative or legislative action (see section 87406, regulation 18746.1);

2. A “permanent ban” prohibiting a former state employee from “switching sides” and participating, for compensation, in any specific proceeding involving the State of California if the proceeding is one in which the former state employee participated while employed by the state (see sections 87401-87402, regulation 18741.1); and

3. Restrictions on a state employee who is negotiating or has any arrangement concerning prospective employment³ (section 87407, regulation 18747).

Since you took a position with KPMG on November 6, 2006, we are not addressing the restriction contained in section 87407. We only address the one-year and permanent ban provisions of the Act.

One-Year Ban

The Act prohibits a designated employee of a “state administrative agency,” 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).)

Section 87400(a) defines a “state administrative agency” to mean:

“ . . . every state office, department, division, bureau, board and commission, but does not include the Legislature, the courts *or any agency in the judicial branch of government.*” (Emphasis added.)

You are in the process of retiring from a position as Assistant Director of Finance at the AOC. The Judicial Council, chaired by the Chief Justice, is the governing body of the California courts. (Cal. Const., Art. VI, sec. 6; Gov. Code section 68500 *et seq.*) The AOC is the organization established by the Judicial Council to serve the courts of California and provide them with administrative support. (Cal. Rules of Court, rule 6.1.) Because the AOC is a judicial branch agency, excluded from the definition of “state administrative agency,” the Act’s one-year ban of section 87406(d) will not restrict your conduct after leaving the AOC. You noted in your request for advice, however, that you have been informed by the Office of the General Counsel of the AOC about several California Rules of Court, outside the Commission’s jurisdiction to interpret, which are applicable to your conduct after leaving the AOC.

³ Prior to separation from state service, a public 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.”

The Permanent Ban on “Switching Sides”

The second post-employment restriction under the Act is a permanent prohibition on influencing any judicial, quasi-judicial, or other proceeding in which the administrative official participated while in state service. (Sections 87401 and 87402; regulation 18741.1.) 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.” (Section 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 proceeding⁴ in which the official would be prohibited from appearing under Section 87401.” (Section 87402.)

The proceedings covered by the permanent ban involve the rights and duties of specific parties and include, for example, a lawsuit, a hearing before an administrative law judge or a state contract. An official is considered to have “participated” in a proceeding if the official took 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 . . .” (Section 87400(d).) A former supervisor is deemed to have participated in a proceeding if: (1) the proceeding was pending before the agency during his or her tenure, and

⁴ 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.”

(2) the proceeding was under his or her supervisory authority. (Regulation 18741.1(a)(4).) Regulation 18741.1(a)(4), copy enclosed, states when proceedings are considered to be under a high-level official's supervisory authority. In addition, the permanent ban does not apply to "new" proceedings, including new contracts with the employee's former agency in which the former employee did not participate. (Section 87401.)

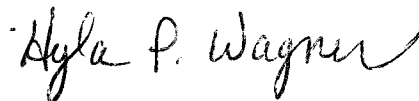
A "[s]tate administrative official" means "every member, officer, employee or consultant of a *state administrative agency* who as part of his or her official responsibilities engages in any judicial, quasi-judicial or other proceeding in other than a purely clerical, secretarial or ministerial capacity." (Section 87400(b), emphasis added.)

The permanent ban on switching sides in a proceeding will not apply with respect to matters you worked on at AOC because AOC is a judicial branch agency, excluded from the definition of "state administrative agency" in section 87400(a), set forth above. The permanent ban will, however, apply to matters you worked on in your former positions at the Department of Youth Authority and the Department of Education, both of which are state administrative agencies. Thus, you may not represent any other person and may not aid, advise, counsel, consult or assist in representing any other person, for compensation, before any state administrative agency in a proceeding involving specific parties in which you participated while serving at the Department of Youth Authority or the Department of Education. (Sections 87400-87405; regulation 18741.1.)

Enclosed is a Commission fact sheet that provides additional information on the post-employment provisions of the Act. If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca
General Counsel



By: Hyla P. Wagner
Counsel, Legal Division

Enclosures: Regulation 18741.1
"Revolving Door and Other Post-Employment Issues" Fact Sheet

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