



FAIR POLITICAL PRACTICES COMMISSION

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September 4, 2007

Alicia Colburn
Lim and Nacimiento Engineering Corporation
1887 Business Center Drive, Suite 6
San Bernardino, CA 92408

Re: Your Request for Advice
Our File No. I-07-135

Dear Ms. Colburn:

This letter is in response to your request for advice regarding the post-governmental employment provisions of the Political Reform Act (the "Act").¹ Because you have not provided any facts related to a specific appearance or communication with your previous government agency employer, we are treating your request as one for informal assistance.² Please note that our advice is based solely on the Act. We therefore offer no opinion on the application, if any, of other post-government employment laws such as Public Contract Code Section 10411. We suggest you seek appropriate legal advice to determine if this or any other provisions outside the Act apply.

QUESTIONS

Do the post-governmental employment provisions of the Act bar you from:

1. working for your new employer and its clients on California Department of Transportation ("Caltrans") highway projects if you did not work on these projects while employed by Caltrans?
2. working on federally funded local highway projects administered by Caltrans which you worked on while employed by Caltrans?

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; regulation 18329(c)(3), copy enclosed).

3. participating on interview panels from which potential clients will select an engineering firm to work on Caltrans projects or projects administered by Caltrans?

CONCLUSIONS

1. & 2. You are prohibited by the 1 year ban from making certain appearances before your former employer and by the permanent ban from representing others on any proceeding in which you participated while working for Caltrans, as outlined below.

3. No. The permanent ban does not prohibit you from representing your current employer in interviewing before potential clients as long as your appearance is not before Caltrans.

FACTS

You recently resigned from your position as Senior Environmental Planner at Caltrans. This was a supervisory position. Your decisionmaking role was to review, comment on and approve/disapprove various types of environmental documents as part of Caltrans' approval of local government agencies' highway programs funded by the federal government.

You are now employed by Lim and Nascimento Engineering Corporation ("LAN") as an environmental manager. In our telephone conversation of August 10, 2007, you advised that LAN performs engineering work on Caltrans highway projects as well as on local highway projects where Caltrans administers the projects for federal funding compliance. You seek advice as to whether the "revolving door" provisions of the Act bar you from working on: 1. Caltrans projects in which you had no involvement while employed at Caltrans; and 2. local highway projects administered by Caltrans on which you worked while employed by Caltrans. You also ask if you may interview on behalf of LAN before potential local government agency clients who seek to select an engineering firm for Caltrans projects or projects administered by Caltrans. In a subsequent conversation, you advised that while employed at Caltrans you were not asked to file a Statement of Economic Interests (Form 700).

ANALYSIS

Public officials who leave state service are subject to two types of post-governmental restrictions under the Act, colloquially known as the "revolving door" prohibition and the permanent ban on "switching sides." 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 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 second restriction is the "one-year ban," prohibiting certain state employees from communicating, for compensation, with their former agency for the purpose of

influencing certain administrative or legislative action (see Section 87406, Regulation 18746.1).

I. The Permanent Ban on “Switching Sides”

The first 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 proceeding in which the official would be prohibited from appearing under Section 87401.” (Section 87402.)

Section 87400 (b) defines state administrative official 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.”

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.” (Emphasis added.)

To apply the permanent ban to your situation, you must identify the proceedings in which you participated while employed by the state.

“Participated” means to have taken 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, but excluding approval, disapproval or rendering legal advisory opinions to departmental or agency staff that do not involve a specific party or parties. (Section 87400(d).)

You state that as a Senior Environmental Planner, you held a supervisory position. Among your decisionmaking responsibilities, you reviewed, commented on and made decisions to approve or disapprove various environmental documents, including Categorical Exemptions, Categorical Exclusions, Initial Study/Negative Declarations, Environmental Assessments/Findings of No Significant Impact, Environmental Impact Reports and Biological Assessments as part of Caltrans oversight of local highway projects. In light of your involvement in particular highway projects that involved specific parties, you are not permitted to represent LAN or its clients on the projects in which you participated while employed by Caltrans. (See Regulation 18741.1(a)(4).)

The permanent ban does not apply to projects in which you did not participate. It also does not bar your participation on interview panels in which clients will be interviewing LAN staff for future projects.

II. The One-Year Ban — “Revolving Door”

A. Application of the One-Year Ban.

Section 87406 of the Act prohibits a state employee from communicating, for compensation, with his or her former agency for the purpose of influencing certain administrative or legislative action or influencing certain proceedings. (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 also applies to former employees who should have been designated in their former employer’s code. (Section 87406(d)(1); Regulation 18746.1(a)(2).)

A state employee "makes a governmental decision" when acting within the scope of his or her authority, he or she: 1) votes on a matter; 2) appoints a person; 3) obligates his or her agency to any course of action; 4) enters into any contractual agreement on behalf of his or her agency; or 5) determines not to act, unless the determination is made due to a conflict of interest. (Regulation 18702.1.)

Additionally, a state employee "participates in making a governmental decision" when he or she negotiates (without significant substantive review) with a government entity or private person regarding a governmental decision, or when he or she advises or makes recommendations to the decisionmaker (either directly or without significant substantive review), by conducting research or an investigation or by presenting any report, analysis or opinion, which requires the exercise of independent judgment on the part of the employee and the outcome or purpose of which is to influence the decision. (Regulation 18702.2.)

From the facts you have submitted, it appears that your position as a Senior Environmental Planner should have been designated in Caltrans' conflict-of-interest code. You approved and disapproved environmental documents as part of Caltrans' approval of local highway programs, thereby obligating Caltrans to a particular course of action. Because it appears your position involved the type of duties that would require the position to be designated, we are providing a general discussion as to the application of the one-year ban.

Regulation 18746.1(b) outlines when the prohibitions of the one-year ban will apply. Under this regulation, an official covered by the one-year ban is prohibited from making an appearance or communication if all of the following apply:

"(1) The official has left his or her state office or employment, which means he or she has either permanently left state service or is on a leave of absence.

"(2) The appearance or communication is made within 12 months after leaving state office or employment.

"(3) The public official is compensated, or promised compensation, for the appearance or communication. However, a payment made for necessary travel, meals, and accommodations received directly in connection with voluntary services is not prohibited or limited by this section.

"(4) The appearance or communication is made on behalf of any person as an agent, attorney, or representative of that person. An appearance or communication made by a public official solely to represent his or her personal interests, as defined in 2 Cal. Code

Regs. Section 18702.4, subdivision (b)(1), is not prohibited or limited by this section.

“(5) The appearance or communication is made for the purpose of influencing, as defined in 2 Cal. Code Regs. Section 18746.2, any legislative or administrative 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.

“(A) Services performed to administer, implement, or fulfill the requirements of an existing permit, license, grant, contract, or sale agreement may be excluded from the prohibitions of this regulation, provided the services do not involve the issuance, amendment, awarding, or revocation of any of these actions or proceedings. However, the prohibitions of Government Code Sections 87401 and 87402 [the permanent ban on “switching sides”] may apply.

“(6) The appearance or communication is made before any officer or employee of any of the following:

“(A) Any state administrative agency that the public official worked for or represented during the 12 months before leaving state office or employment...

“(B) Any state administrative agency which budget, personnel, and other operations are subject to the direction and control of any agency described in subdivision (b)(6)(A)...

“(C) Any state administrative agency subject to the direction and control of the Governor, if the official was a designated employee of the Governor’s office during the 12 months before leaving state office or employment.”

However, “an appearance before a state administrative agency” does not include an appearance in a court of law or before an administrative law judge. (Section 87406(d)(1).)

B. Communications Covered by the One-Year Ban.

Communications restricted by the one-year ban include any formal or informal appearance or oral or written communication made to influence legislative or administrative action or any action on a proceeding. (Section 87406(d)(1).) These communications include, but are not limited to, conversing directly or by telephone,

corresponding by writing or e-mail, attending a meeting, and delivering or sending any communication. (Regulation 18746.2(a).) A communication is considered to be for the purpose of influencing legislative or administrative action "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).)

However, certain communications are not restricted under the one-year ban. It is not considered a prohibited communication under the one-year ban, if an individual:

"(1) Participates as a panelist or formal speaker at a conference or similar public event for educational purposes or to disseminate research and the subject matter does not pertain to a specific action or proceeding;

"(2) Attends a general informational meeting, seminar, or similar event;

"(3) Requests information concerning any matter of public record;
or

"(4) Communicates with the press." (Regulation 18746.2(b)(1)-(4).)

Thus, the one-year ban would not prevent you from requesting information generally available to the public about agency business from Caltrans or other state agencies. Nor would it prohibit you from attending informational meetings of Caltrans or another state agency regarding existing laws, regulations, or policies, as long as you do not attempt to influence the agency's legislative or administrative action. Social conversations with employees of Caltrans and other state agencies that are not intended to influence administrative or legislative action are not prohibited by the ban. (*Tobias Advice Letter, No. A-96-089.*) (Section 87406(d)(1).)

Whether a particular meeting or conversation is for the purpose of influencing administrative or legislative action (as defined by regulation 18746.2) depends on the facts of each case. For instance, if an ex-employee attends a public meeting with many other persons, where there are many topics on the agenda, it may be reasonable to infer that the ex-employee's 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, or other specific 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)), it may more readily be inferred that the former employee's presence at the meeting is intended to influence agency action. (*Ramirez Advice Letter, No. A-99-300.*)³

³ Further information is provided in the enclosed fact sheet prepared by the Commission to address common questions associated with post-employment restrictions.

Also, appearances or communications before a former state agency employer, made as part of "services 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); *Williams* Advice Letter, No. I-06-058 citing to *Quiring* Advice Letter, No. A-03-272 and *Hanan* Advice Letter, No. I-00-209.)

We have 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. (*Williams* Advice Letter, supra, citing to *Cook* Advice Letter, No. A-95-321 and *Harrison* Advice Letter, No. A-92-289.) Similarly, a former agency official may use his or her expertise to advise clients on the procedural requirements, plans, or policies of the official's former agency so long as the employee is not identified with the employer's efforts to influence the agency. (*Perry* Advice Letter, No. A-94-004.)

Provided that your work on Caltrans projects or Caltrans-administered projects does not involve appearances or communications or it falls within the exception of Regulation 18746.1(b)(5)(A), the one-year ban is not violated. You may draft proposals and advise LAN and its clients on the procedural requirements, plans, or policies of Caltrans so long as you are not identified with LAN's or its clients' efforts to influence Caltrans.

Finally, as long as your participation on interview panels is an activity taking place before LAN's clients and not Caltrans, it does not constitute an appearance or communication before your former agency, and the one-year ban does not apply.

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

Sincerely,

Scott Hallabrin
General Counsel



By: Valentina Joyce
Counsel, Legal Division

VJ:jgl

Enclosure