FAIR POLITICAL PRACTICES COMMISSION
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April 9, 2009

Steve Mihara
26 Snyder Way
Fremont, California 94536

RE: Your Request for Informal Assistance
Our File No. I-09-047

Dear Mr. Mihara:

This letter responds to your request for advice regarding the revolving door provisions of the Political Reform Act (the "Act").[1] This letter should not be construed as assistance on any conduct that may have already taken place; the Commission does not provide advice with respect to past conduct. (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.) Because your question is general in nature, we are treating your request as one for informal assistance.[2]

Please note that our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application, if any, of other laws such as the post-government employment restrictions of Public Contract Code Section 10411. You may wish to consult the Attorney General's office regarding these provisions.

QUESTIONS

1. What restrictions do the Act's revolving door prohibitions place on your activities on behalf of a local government agency regarding contacts with your former employer, a state government agency?

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[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.)

2. May you perform auditing work as a self-employed contractor for health care plans and submit those audits to MRMIB under the MRMIB follow up program.

CONCLUSIONS

1. You are subject to the provisions of the Act's "one-year ban" and "permanent" ban as described below. You may not communicate with your former employer, for compensation, on behalf of another for a period on one-year after you leave state service if that contact is made for the purpose of influencing administrative or legislative actions 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. Additionally, you are prohibited 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 you participated while employed by the state.

2. Because MRMIB is not your former employer, the Act's "one-year ban" does not apply to any contacts you make with this agency, so long as its budget, personnel, and other operations are not subject to the control of the Department of Managed Heath Care (DMHC). However, the Act's permanent ban would prevent you from "switching sides" and representing your current employer with respect to any follow up audits because you participated in audits of that health care provider while you were engaged in state service.

FACTS

You were employed by the DMHC, Financial Oversight Division from May 2005 through January 2009. At the time of your departure, you held a position as an Examiner IV (supervisor). For the last two years at DMHC, you were primarily responsible for overseeing an audit program to review the medical loss ratios for the Healthy Families program administered by the Managed Risk Medical Insurance Board (the "MRMIB"). The Healthy Families program audits were the result of an interagency contract between the DMHC and the MRMIB. Audit guidelines were established by DMHC so that there would be no cross communication between the MRMIB audits and the DMHC audits and thus insulate the operations as much as possible (at the urging of health care plans to avoid double jeopardy).

Santa Clara County Health Authority ("SCCHA") is a licensed health care plan under the Knox-Keene Act. The DMHC exercises oversight of health care plans under this act. During the last two years at the DMHC, you did not participate in any financial monitoring activities, routine examinations, or non-routine examinations of the SCCHA.

SCCHA has a contract with the MRMIB to provide services to low income children under the Healthy Families Program. During the last two-and-a-half years, you performed or supported the audits of approximately 30 MRMIB audits, one of which was

on the SCCHA. MRMIB has not completed its review of the audit results nor has it, as yet, recommended the implementation of any corrective action plans for the audit you conducted of SCCHA.

You left the employment of the DMHC for a position at SCCHA when you were offered your current position several months after the conclusion of the MRMIB audit of SCCHA. MRMIB has been planning to incorporate a follow-up audit procedure in future contracts with health care plans, which may require a health plan to incur a second audit to be completed at its expense in the event that the plan does not perform satisfactorily against their contracted Medical Loss Ratio rate. In anticipation of leaving the DMHC, you offered to the MRMIB that you would be available to conduct those exams (the DMHC may not be able to conduct the exams based on budget and staffing limitations). Under such a scenario, the health care plans will be contracting directly with you (if you are an acceptable audit source to MRMIB), giving you access to the privacy information ("HIPPA") necessary to properly conduct the examination. MRMIB would thereby receive a summary audit report similar to what it currently receives from DMHC (MRMIB does not have authority to receive the privacy information obtained during the course of the examination).

The DMHC has taken the position that "zero tolerance" applies in any communications with you as a former employee. This has resulted in employees at the DMHC not communicating with you (and presumably other DMHC employees) on "any and all business issues."

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. 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 have any arrangement concerning employment.[3] (Also see Regulation 18747.)

Post-Governmental Employment Provisions

One-Year Ban – The "one-year ban" prohibits a former state employee from appearing before or communicating with, for compensation, his or her former agency for the purpose of influencing any administrative or legislative actions 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. (See Section 87406; Regulation 18746.1.)

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[3] Because you have already left state service, we do not address this issue. The Commission does not provide advice with respect to past conduct.

The one-year ban applies to any employee of a state administrative agency who holds a position that is designated or should be designated in the agency's conflict-of-interest code. (Section 87406(d)(1); Regulation 18746.1(a)(2).)[4] The ban applies for 12 months from the date the employee leaves state office or employment, which is defined as the date the employee permanently leaves state service or takes a leave of absence. (Regulation 18746.1(b)(1) and (2).)

While in effect, the one-year ban applies only when a former employee or official is being compensated for his or her appearances or communications before his or her former agency on behalf of any person as an agent, attorney, or representative of that person. (Regulation 18746.1(b)(3) and (4).)

In contrast to the permanent ban, which only applies to "judicial or quasi-judicial" proceedings, the one-year ban applies to "any appearance or communication 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." (Regulation 18746.1(b)(5).) An appearance or communication is for the "purpose of influencing" if it is made for the "principal purpose of supporting, promoting, influencing, modifying, opposing, delaying, or advancing the action or proceeding." (Regulation 18746.2.) An appearance or communication includes, but is not limited to, conversing by telephone or in person, corresponding in writing or by electronic transmission, attending a meeting, and delivering or sending any communication. (*Id.*)

Section 82002(a) defines "administrative action" as:

> " (a) 'Administrative action' means the proposal, drafting, development, consideration, amendment, enactment, or defeat by any state agency of any rule, regulation, or other action in any ratemaking proceeding or any quasi-legislative proceeding, which shall include any proceeding governed by Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2."

Section 82037 defines "legislative action" as:

> "'Legislative action' means 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 official capacity.

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[4] A governmental employee should be designated in his or her agency's conflict-of-interest code if the employee makes or participates in making governmental decisions that have a reasonably foreseeable material effect on any financial interest. (Section 87302.)

'Legislative action' also means the action of the Governor in approving or vetoing any bill."

Finally, appearances and communications are prohibited only if they are before a state agency that the public official worked for or represented or a state agency "which budget, personnel, and other operations" are subject to the control of a state agency the public official worked for or represented. (Regulation 18746.1(b)(6).) This would apply to any covered communications you may have with DMHC.[5]

However, not all communications are prohibited by the one-year ban. 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); *Quiring* Advice Letter, No. A-03-272; *Hanan* Advice Letter, No. I-00-209.)

Additionally, Regulation 18746.2(b)(1)-(4) provides that appearances or communications are not restricted 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."

We have also advised that a former agency official may, without violating the one-year ban, 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, 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.)

From the facts provided, you are a former designated employee of the DMHC and are now employed with a local governmental agency. As such, appearances before or

[5] You have not provided any information about whether or not MRMIB is an agency with budget, personnel, and other operations that are subject to the control of DMHC. For purposes of our analysis, we assume it is not.

communications with the DMHC on behalf of the local governmental agency are prohibited for a one-year period if made for the purpose of influencing administrative or legislative action or influencing any action involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property.

You have indicated that you have had certain problems regarding your former employer engaging in any communications whatsoever with you. However, as indicated above, you are not prohibited from making any contacts whatsoever with your former employer. You may prepare administrative an financial filings for SCCHA as required by DMHC or MRMIB so long as these filing are not for the purpose of influencing administrative action. Even if they are, you may still prepare the filing so long as your name does not appear on the filings. You may serve as the contact person for coordination of information requests between SCCHA and DMHC or MRMIB so long as you do not engage in any activities to influence administrative or legislative action as outlined above. You may assist your current employer in implementing any corrective plans that the DMHC or MRMIB may impose, so long as you do not make any communications with DMHC for the purpose of influencing any administrative action or any discretionary act involving possible amendments to the requirements imposed. Finally, because MRMIB is not your former employer, the Act's revolving door provisions do not apply to any communication you may engage in with that agency.

Hopefully, this assistance will help you in making future determinations of whether any particular appearance or communication is prohibited under the one-year ban. If you need further assistance relating to a specific appearance or communication, you should seek further advice providing all relevant facts.

Permanent Ban – The "permanent ban" prohibits 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 judicial, quasi-judicial, or other proceeding in which you participated while you served as a state administrative official. "'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).)

"The permanent ban does not apply to a 'new' proceeding even in cases where the new proceeding is related to or grows out of a prior proceeding in which the official had participated. A 'new' proceeding not subject to the permanent ban typically involves different parties, a different subject matter, or different factual issues from those considered in previous proceedings." (*Rist* Advice Letter, No. A-04-187; also see *Donovan* Advice Letter, No. I-03-119.) New contracts with the employee's former agency in which the former employee did not participate are considered new proceedings. (*Leslie* Advice Letter, No. I-89-649.) A new contract is one that is based on new consideration and new terms, even if it involves the same parties. (*Ferber* Advice Letter, No. I-99-104; *Anderson* Advice Letter, No. A-98-159.) In addition, the application, drafting, and awarding of a contract, license, or approval is considered to be a proceeding separate from the monitoring and performance of the contract, license, or approval. (*Anderson, supra; Blonien* Advice Letter, No. A-89-463.)

You have indicated that while you were employed at DMHC you performed or supported certain audits, one of which was on the SCCHA, your current employer. As such, you participated in a "judicial, quasi-judicial or other proceeding" as an employee of the DMHC and are, consequently, permanently barred from "switching sides" and participating in the same proceeding on behalf of the local agency or assisting the local agency in the proceeding. If you need additional assistance relating to a specific proceeding in which you previously participated, you should seek further advice providing all relevant facts.

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

Sincerely,

Scott Hallabrin
General Counsel

By: William J. Lenkeit
Senior Counsel, Legal Division

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Enclosure