



FAIR POLITICAL PRACTICES COMMISSION

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July 30, 2009

Donna M. Martinez
6528 Meadowcreek Way
Citrus Heights, CA 95621

Re: Your Request for Informal Assistance
Our File No. I-09-181

Dear Ms. Martinez:

This letter is in response to your request for assistance regarding the “revolving door” provisions of the Political Reform Act (the “Act”).¹ Because you are requesting general information on the operation of the law, and do not inquire about a narrowly restricted post-employment business plan, we are providing you with informal assistance.² Please bear in mind also that our advice is based solely on the provisions of the Act. We offer no opinion on the application, if any, of such provisions as Government Code Section 1090, or other post-government employment laws such as Public Contract Code Section 10411. We urge you to consult with your agency’s counsel or the Attorney General’s office on these provisions, particularly regarding Public Contract Code Section 10411.

QUESTIONS

1. What restrictions does the Act impose on your doing business with the Department of Health Care Services, or other state agencies after you leave state service?
2. What restrictions does the Act place on consulting work you would perform if, after leaving state service, you start your own consulting firm serving private companies that wish to do business with the state?
3. Does the Act bar you from discussing future job opportunities in the private sector while still employed by the State?

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 regulations may be found in 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).

CONCLUSIONS

We review in general terms the Act's limitations applicable to your post-retirement employment plans, and further advise that, although you are not prohibited from discussing private sector job opportunities while still employed by the State, the Act does restrict your governmental decisionmaking powers in matters directly relating to any person with whom you are negotiating, or have any arrangement concerning, prospective employment.

FACTS

You are the Chief of the Office of Medi-Cal Procurement ("OMCP") in the Department of Health Care Services ("DHCS"), a department within the California Health and Human Services Agency. As a member of the DHCS Executive Staff, you direct the procurement activities for twelve other Divisions/Offices for large Medi-Cal service contracts. You have overall responsibility for planning and managing the procurement processes, and ultimate contract decisionmaking authority.

You are contemplating retirement from state service, and will seek employment in the private sector. The two options you are considering are employment with a company that provides services to state departments, or establishing your own consulting practice, which would focus on work with private-sector companies that do business with or wish to do business with the state. Specifically, you would provide the following services:

- Strategic planning,
- Development of marketing and business plans,
- Reviewing, editing and assisting in development of proposals responsive to bid requests,
- Research into potential contract opportunities,
- Business development services,
- Training on State administrative and legislative processes and requirements,
- Technical consulting services in the area of health care.

ANALYSIS

Public officials are subject to three types of post-governmental restrictions under the Act. A one-year "revolving door" restriction bars certain state employees from communicating, for compensation, with their former agencies for the purpose of influencing certain administrative or legislative action. (Section 87406, Regulation 18746.1.)

A permanent ban prohibits a former state employee from "switching sides" to participate, for compensation, in a proceeding involving the State of California if the proceeding is one in which the former state employee participated while employed by the state. (Sections 87401-87402, Regulation 18741.1.)

Finally, a restriction on influencing prospective employment prohibits a public employee from participating in, or using his or her official position to influence, a governmental decision directly relating to any person with whom he or she is negotiating or has an arrangement concerning prospective employment. (Section 87407, Regulation 18747.)

The One-Year “Revolving Door” Restriction

A. General Application of the One-Year Ban

Section 87406 prohibits specified officials from acting as agents or attorneys or otherwise representing, for compensation, “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 one year after the official left the agency’s employment “*if the appearance or communication is 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.*” (Emphasis added.)

Regulation 18746.2(a) further provides:

“(a) For purposes of Government Code Section 87406, a formal or informal appearance or oral or written 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. An appearance or communication includes, but is not limited to, conversing by telephone or in person, corresponding with in writing or by electronic transmission, attending a meeting, and delivering or sending any communication.”

We assume from your employment history that you were required to file a Form 700 “Statement of Economic Interests” as a “designated employee” under the agency’s conflict of interest code, and you are therefore subject to the Act’s one-year ban.

Regulation 18746.1(b) outlines the circumstances 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 . . .

“(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.”

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.”³ (Regulation 18746.2(a).)

³ “Legislative action” is defined at Section 82037 to mean “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. “Legislative action” also means the action of the Governor in approving or vetoing any bill.” Section 82002(a) provides that “‘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.

Certain communications are *not* restricted under the one-year ban. A communication is not subject to the one-year ban when the former official:

“(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 your former employer or other state agencies. Nor would it prohibit you from attending informational meetings regarding existing laws, regulations, or policies, as long as you do not attempt to influence legislative or administrative actions by your former agency. Social conversations with employees of your former agency that are not aimed at influencing its administrative or legislative actions 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 or a specific proceeding (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.)⁴

Similarly, as noted above, Regulation 18746.1(b)(5)(A) provides that performing services to administer, implement, or fulfill the requirements of an existing permit, license, grant, contract, or sale agreement are not considered appearances or communications prohibited under Section 87406, so long as you do not influence other administrative or legislative action, or the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property.

Accordingly, for purposes of the one-year ban under Section 87406, the Act does not prevent you from accepting post-governmental employment in the private sector, but for twelve months after you leave state employment, you may not make any appearance before your former

⁴ Further information is provided in the enclosed fact sheet prepared by the Commission to address common questions associated with post-employment restrictions.

employer 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.

The Permanent Ban on “Switching Sides”

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 applicable to any judicial, quasi-judicial, or other proceeding in which you participated while employed 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).) An official has “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, subject matter, or circumstances that differ from those involved in previous proceedings. (*Rist* Advice Letter, No. A-04-187; also see *Donovan* Advice Letter, No. I-03-119.) New contracts let by 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 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 the award of a contract, license, or approval is considered a proceeding separate from the monitoring and performance of the contract, license, or approval. (*Anderson, supra; Blonien* Advice Letter, No. A-89-463.)

While we have outlined the general provisions of the permanent ban for your review, you have not advised us in detail of your participation in specific proceedings while in state service, nor of the potential relationship between any such proceedings and matters on which you will be employed by a private-sector client. To evaluate application of the permanent ban to services you may lawfully offer a private-sector client, you will need to determine whether any of the services you may provide to a new employer involve a proceeding in which you participated while employed by the State. (Regulation 18741.1(a)(4).) If you need assistance in evaluating private-sector services relating to a specific proceeding in which you *may* have previously participated, you should seek further advice when you can provide us with the relevant facts.

The Ban Against Influencing Prospective Employment

The Act's final restriction relating to post-governmental employment in the ban against influencing prospective employment, found at Section 87407:

"No public official shall make, participate in making, or use his or her official position to influence, any governmental decision directly relating to any person with whom he or she is negotiating, or has any arrangement concerning, prospective employment."

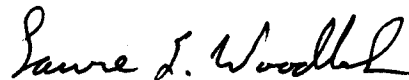
The term "public official" is defined, in part, in Section 82048 as ". . . every member, officer, employee or consultant of a state or local government agency, but does not include judges and court commissioners in the judicial branch of government. . . ." DHCS is a state administrative agency, as defined in Section 87400(a), and as a retiring Director of its FI-MMIS Project, you would be subject to this ban.

"A public official is 'negotiating' employment when he or she interviews or discusses an offer of employment with an [potential] employer or his or her agent." (Regulation 18747(c)(1).) The Commission has construed the scheduling, conduct, and follow-up to an interview as one continuous process falling under the definition of "negotiating" employment. (*Bonner Advice Letter*, No. I-98-287.) However, the mere act of sending a resume or application to a potential employer has not been considered "negotiating." Similarly, entertaining informal inquiries about your future plans and accepting expressions of general interest in discussing employment opportunities at some point in the future is not considered "negotiating." (*Id.*) "A public official has an 'arrangement' concerning prospective employment when he or she accepts an employer's offer of employment." (Regulation 18747(c)(2).)

We hope that this discussion of the Act's post-employment restrictions will assist you in framing and pursuing your post-separation plans. If you have other questions in this area, please contact me at (916) 322-5660.

Sincerely,

Scott Hallabrin
General Counsel



By: Lawrence T. Woodlock
Senior Counsel, Legal Division

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Enclosures