



FAIR POLITICAL PRACTICES COMMISSION

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September 23, 2010

Timothy A. Robards
1505 Hannah Court
Dixon, California 95620

Re: Your Request for Advice
Our File No. I-10-116

Dear Mr. Robards:

This letter responds to your request for advice regarding post-employment restrictions of the Political Reform Act (the "Act").¹ Because your inquiry 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 Act. We therefore offer no opinion on the application, if any, of other post-government employment laws such as Public Contract Code Section 10411 or on any incompatible activities restrictions your agency may impose under Government Code Section 19990. We also offer no advice on the application, if any, of Government Code Section 1090. We urge you to contact the Attorney General's office regarding issues arising under the Public Contract Code and Government Code Section 1090.

Additionally, this letter should not be construed as advice on any conduct that may have already taken place. This letter is based on the facts presented. The Fair Political Practices Commission ("Commission") does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71; Govt. Code Section 83114.)

QUESTION

After leaving state service and becoming a private consultant, what restrictions will be

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. (Regulation 18329(c).)

placed on your contacts with your former agency, the California Department of Forestry and Fire Protection ("CAL FIRE")?

CONCLUSION

The one-year ban would prohibit you from communicating with employees of CAL FIRE, for one year after you leave this agency, if the communication is for the purpose of influencing any legislative or administrative action, or influencing 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." The permanent ban is a lifetime ban that would prohibit you from participating in any judicial, quasi-judicial or other proceeding in which you participated while a state administrative official at CAL FIRE or any other state agency where you previously worked.

FACTS

You worked for the State as a Forester II with CAL FIRE, and your last day was June 30, 2010. On July 1, 2010, you became a private consultant. Your former position with CAL FIRE was not included in the agency's conflict-of-interest code. As part of your duties at CAL FIRE you studied forest conditions and conducted research and analysis related to climate change and implementation of Assembly Bill 32, the California Global Warming Solutions Act. As part of your duties you compiled your analysis and research into a large report on climate change that was submitted to CAL FIRE's Deputy Director. In our telephone conversation you stated that as part of your duties you have been asked to testify in court proceedings on behalf of CAL FIRE. You also spent eight years managing CAL FIRE's competitive grants and research programs, and this position was also not designated in CAL FIRE's conflict-of-interest code. In our telephone conversation of July 22, 2010, you explained that you were considered an expert in your field. The reports you created and the research you conducted contained recommendations for action that were used by CAL FIRE's leadership to make decisions on environmental policy issues.

ANALYSIS

Post-Governmental Employment Restrictions

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. (Section 87407; Regulation 18747.)

One Year Ban: This ban prohibits a public official from appearing for compensation before his or her former agency, or officer or employee thereof, for the purpose of influencing any administrative, legislative or other specified action (including contracts).

Permanent Ban: This ban prohibits a former state administrative official from advising or representing any person, other than the State of California, for compensation in any judicial, quasi-judicial or other proceeding in which the official participated while in state service. (See Sections 87401-87402, Regulation 18741.1); and

Restrictions on Negotiating Prospective Employment: This prohibition restricts public officials from negotiating or making any arrangement concerning prospective employment (Section 87407, Regulation 18747).

The One-Year Ban

The one-year prohibition applies to employees who were designated or should have been designated in their former agency's conflict-of-interest code. Accordingly, although your former position with CAL FIRE was not designated in the agency's conflict-of-interest code, the one-year ban still applies to you if your position should have been designated your agency's conflict-of-interest code, because you made or participated in the making of governmental decisions that may have had a reasonably foreseeable material effect on one of your financial interests. (Section 87406(d)(1); Regulation 18746.1(a)(4), copy enclosed.)

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 (copy enclosed).)

A state employee "participates in making a governmental decision" when he or she negotiates (without significant substantive review) with a governmental 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 that 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 (copy enclosed).)

We have advised that an employee participates in the making of a governmental decision, even if it is reviewed by several of his or her superiors, if any of the following apply: 1) the superiors rely on the data or analysis prepared by the employee without checking it independently; 2) the superiors rely on the professional judgment of the employee; or 3) the employee in some other way actually influences the final decision. (*Lilyquist* Advice Letter, No. M-96-318 [Memorandum to the Attorney General].)

You have stated that you have not been required to file a statement of economic interests for at least several years because you were not a "designated employee" under the CAL-FIRE conflict-of-interest code. However, from the facts provided in your request for advice and telephone conversations with you, it appears that your position as a Forester II should have been

designated in CAL FIRE's conflict-of-interest code because you conducted research and made recommendations to leaders of your agency while serving as an expert on issues involving the forest and climate change. Moreover, nothing in your facts indicate that the CAL FIRE has made a determination that your position was properly not designated in its conflict-of-interest code.

Therefore, even if your specific position was not included in CAL FIRE's conflict-of-interest code, pursuant to the requirements of Section 87302, the one-year ban would apply to you because it appears you held a position at CAL FIRE that entailed the making or participation in the making of governmental decisions. (Section 87406(d)(1); Regulation 18746.1(a)(2); *Unterreiner* Advice Letter, No. I-98-299.)

Accordingly, you may not appear before or communicate with CAL FIRE regarding the issuance, amendment, or awarding of any contracts for a period of one year after you leave state service. However, not all communications to a former state administrative agency employer are prohibited by the one-year ban. The ban extends only to those communications for the purpose of influencing any legislative or administrative action, or influencing 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." (Section 87406(d)(1); Regulation 18746.1(b)(5).) 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).)

Additionally, you may appear before or communicate with CAL FIRE for the purpose of administering, implementing, or fulfilling the requirements of a pre-existing contract or project, so long as the services do not involve the issuance, amendment, awarding, or revocation of a permit, license, agreement or contract, or the sale or purchase of goods or property.³ (Regulation 18746.1(b)(5)(A); *Quiring* Advice Letter, No. A-03-272; *Hanan* Advice Letter, No. I-00-209.)

This is a fact-specific query. You may wish to submit more information about and request further advice regarding a specific contract or project.

The Permanent Ban

The permanent ban is a lifetime ban and applies to any judicial, quasi-judicial or other proceeding in which you participated while a state administrative official at CAL FIRE or any other state agency. (Sections 87401 and 87402.) Thus, a public official may never "switch

³ Certain other types of communications are *not* restricted under the one-year ban. For instance, 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).)

sides" in a proceeding after leaving state service. ¹ "State 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).)

As a Forester II with CAL FIRE, you were a state administrative official for purposes of the Act. You stated that you testified in judicial proceedings on behalf of CAL FIRE. Therefore, you are subject to the permanent ban once you leave state service and may not participate in any proceeding in which you participated while employed by the State. (Section 87400(b).) "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).)

However, Sections 87401 and 87402 do not restrict your ability to participate in *new* proceedings. "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, supra.*) 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.)

Ban on Influencing Prospective Employment

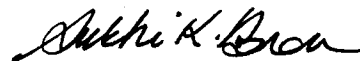
Section 87407, the ban against influencing prospective employment, provides: "No public official, shall make, participate in making, or use his or her official position to influence, any governmental decision directly relating to any person with whom he or she is negotiating, or has any arrangement concerning, prospective employment."

You stated that after leaving state service you have now become a private consultant. Therefore, because you have already left state service this ban no longer affects you. You have not provided any information regarding the types of matters in which you may be involved as a private consultant that may be affected by the above restrictions. Should you have additional questions with regard to specific issues, please feel free to make further inquiry.

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

Sincerely,

Scott Hallabrin
General Counsel



By: Sukhi K. Brar
Counsel, Legal Division

SKB:jgl

Enclosures