



FAIR POLITICAL PRACTICES COMMISSION

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January 21, 2010

Craig Swieso
16 Marjoram Court
Sacramento, California 95814

**RE: Your Request for Advice
Our File No. A-10-207**

Dear Mr. Swieso:

This letter responds to your request for advice regarding the post-governmental employment provisions of the Political Reform Act (the "Act").¹ 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.)

Additionally, our advice is limited to obligations arising under the Act. We do not address the applicability, if any, of other post-government employment laws such as Public Contract Code Section 10411.

QUESTION

May you attend and participate in a public hearing before your former employer on a proposed regulatory amendment in which you participated during your employment if your attendance is to represent yourself and you are not compensated by another person?

CONCLUSION

Yes. Because you are not being compensated for your attendance at the meeting, you may attend and participate in the hearing for the purpose of representing your own interests.

FACTS

You are currently an attorney with the Franchise Tax Board (FTB) and will be leaving state service in January 2011 to take a position with a national accounting firm. Over the past

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.

year you have been involved with drafting amendments to California Code of Regulations, title 18, section 25106.5-1. On April 21, 2010 and September 22, 2010, you acted as a hearing officer during public meetings wherein the proposed amendments were discussed. This process is still in the informal stage. The formal regulatory process with the Office of Administrative Law (OAL) has not yet begun. The proposed amendments will very likely be the subject of another public meeting, which will occur after you leave state service.

You wish to know if you can participate in any future public meeting involving the proposed amendments as an interested party and not as a formal representative of any person. Because you will only be representing yourself, you will not be compensated by anyone else for your participation.²

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

The 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.)

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).)

² You have indicated that your “employer will be paying [you your] basic salary.” We assume that this “basic salary” does not include compensation for you attendance at the described activity and that you will be attending entirely on your own time.

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.

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.)

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. ‘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 FTB.

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.)

The 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

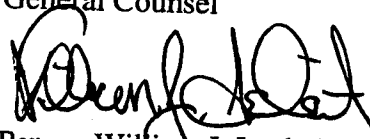
different subject matter, or different factual issues from those considered in previous proceedings." (*Rist* Advice Letter, No. A-04-187; also see *Donovan* Advice Letter, No. I-03-119.) New contracts with the employee's former agency in which the former employee did not participate are considered new 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.)

Because you are not being compensated to appear and participate in the public meetings held by the FTB, and you are attending solely to represent your own interest, neither the one-year ban nor the permanent ban apply to you in this situation.

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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