



FAIR POLITICAL PRACTICES COMMISSION

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April 28, 2011

Philip M. Jay
District Counsel
San Joaquin Valley Air Pollution Control District
1990 E. Gettysburg Avenue
Fresno, CA 93726-0244

Re: Your Request for Informal Assistance
Our File No. I-11-055

Dear Mr. Jay:

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. (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

QUESTION

As the former legal counsel for an air pollution control district, what restrictions do the Act's revolving door provisions, and more particularly Section 87406.1, place on your activities before the district?

CONCLUSION

Section 87406.1 prohibits you from appearing before or communicating with your former governmental employer, for a period of one-year upon leaving your position, if the appearance or communication is made for the purpose of influencing a regulatory action as discussed below.

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).)

FACTS

You were formerly the District Legal Counsel for the San Joaquin Valley Unified Air Pollution Control District (the "District"). Directly appointed by the District's Governing Board, you are the chief legal advisor to the Governing Board, the Air Pollution Control Officer, and various District departments. You left the District on April 23, 2011, to pursue private practice including both consulting and legal representation.

If permitted under the Act's revolving door provisions, you anticipate representing clients in specific permitting and enforcement matters that are handled by District staff and may potentially engage in the following activities:

- Permit applications and negotiating with District staff.
- Variance hearings and permit appeals before the District hearing board.
- Legal representation on notices of violation and court enforcement cases.
- Attendance at rulemaking workshops for informational purposes.
- Attendance at the Governing Board's meetings as an observer.

ANALYSIS

The Act's revolving door provisions include two post-employment rules applicable to officials and employees of an air pollution control district, which are found in Sections 87406.1 and 87406.3. However, Section 87406.3 only applies to elected officials and chief administrative officers or general managers of a county, city, or special district. Accordingly, as the District's former legal counsel, Section 87406.3 does not apply to your particular circumstance and we do not discuss it further.³

In pertinent part, Section 87406.1, which applies to both air pollution control districts and air quality management districts, states:

"No former member of a district board, and no former officer or employee of a district who held a position which entailed the making, or participation in the making, of decisions which may foreseeably have a material effect on any financial interest, shall, for a period of one year after leaving that office or employment, act as agent or attorney for, or otherwise represent, for compensation, any other person, by making any formal or informal appearance before, or by making any oral or written communication to, that district board, or

³ Prior to leaving governmental service, Section 87407 also prohibits 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. (See Regulation 18747.) However, you have already left governmental service. Because the Commission will not advise with respect to past conduct, we provide no opinion as to the application of Section 87407 to your particular circumstances. (See Regulation 18329(b)(8)(A) and (c)(4)(A).)

any committee, subcommittee, or present member of that district board, or any officer or employee of the district, if the appearance or communication is made for the purpose of influencing regulatory action.”

A former officer or employee of an air pollution control district or an air quality control district is subject to the one-year prohibition of Section 87406.1 if the officer or employee held a position with the district that entailed the making, or participation in the making, of decisions that may foreseeably have a material effect on any financial interest. Pursuant to Sections 87300 and 87302, every agency must adopt and promulgate a conflict-of-interest code designating those positions within the agency that involve the making or participation in the making of decisions that may foreseeably have a material effect on any financial interest. Accordingly, Section 87406.1 applies to both officers and employees designated in the District’s conflict-of-interest code and those that should be designated in the District’s code. As the legal counsel for the District, you are subject to Section 87406.1 as either a designated employee or as an employee that should have been designated.

As a former officer or employee subject to Section 87406.1, you are prohibited from making an appearance before or a communication to your former agency employer for the purpose of influencing regulatory action for one year. Under Section 87406.1, what constitutes a “regulatory action” is not defined. We have, however, previously determined that “regulatory action” should be interpreted broadly to include every rule, regulation, or other action in any rate-making proceeding or any quasi-legislative proceeding before an air pollution control district or an air quality control district. (*Wood Advice Letters*, Nos. I-95-167 and I-95-232.) Nonetheless, influencing proceedings of the former employer, other than a “regulatory action,” is not prohibited by the language of the statute. As applied to your facts, this would include any appearance before or communication to District staff in a permitting or enforcement matter involving specific parties including the following activities:

- Permit applications and negotiating with District staff.
- Variance hearings and permit appeals before the District hearing board.
- Legal representation on notices of violation and court enforcement cases.

Additionally, by the express terms of the statute, an appearance or communication that is not for the purpose of influencing regulatory action is not prohibited. Thus, the following activities are permitted under Section 87406.1, so long as you do not use the opportunity to make an appearance or communication for the purpose of influencing the action:

- Attendance at rulemaking workshops for informational purposes.
- Attendance at the Governing Board’s meetings as an observer.

However, while Section 87406.1 does not prohibit your attendance at a rulemaking workshop or a meeting of the Governing Board solely as an observer, we strongly caution that taking part in the discussion of the subject matter during the workshop or meeting or discussing

the subject matter with the Governing Board or District staff would constitute an improper attempt to influence a "regulatory action" and should be avoided.

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

Sincerely,

John W. Wallace
Assistant General Counsel

A handwritten signature in black ink, appearing to read "Brian G. Lau", with a long horizontal flourish extending to the right.

By: Brian G. Lau
Counsel, Legal Division

BGL:jgl