



FAIR POLITICAL PRACTICES COMMISSION

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October 3, 2011

John P. Christopher, PhD, DABT
8173 Suarez Way
Elk Grove, CA 95757-6258

Re: Your Request for Advice
Our File No. A-11-163

Dear Mr. Christopher:

This letter responds to your request for advice regarding the post-governmental employment provisions of the Political Reform Act (the "Act").¹ 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; Gov. Code, § 83114.)

This letter is based solely on provisions of the Act. We can offer no opinion on the application, if any, of such provisions as post-government employment laws in the Public Contract Code.

QUESTION

Whether the Act's permanent ban prevents you from working for an independent contractor on a project that is similar to a project you worked on while in state service.

CONCLUSION

The Act prohibits former state employees from "switching sides" and assisting a private employer on the same proceeding that the employee participated in as a state employee. Whether the proceeding is the "same" or a "new proceeding," as discussed below, will determine whether you are permitted to participate.

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.

FACTS

You retired in March of 2010 from the Department of Toxic Substances Control (“DTSC”) where you were a Staff Toxicologist. DTSC is the state regulatory body that oversees environmental cleanups on, among other areas, military bases. The relevant project for purposes of your request is on the Naval Base Ventura County Point Mugu (“Point Mugu”) – a project on which you worked while at DTSC and which you would like to work in your new, private, capacity.

While the Environmental Protection Agency is typically the primary agency on a cleanup plan, per federal law, the Department of Defense is the primary agency in charge of any cleanup on a military base and in certain instances, like at Point Mugu, it is the United States Navy that is the primary agency, depending on which military base is involved. Environmental cleanups happen in many phases as prescribed by federal law and detailed in the National Oil and Hazardous Substances Pollution Contingency Plan (“National Contingency Plan”), which is the body of law that governs all cleanups of hazardous waste.

Several entities lend talent and skill to the cleanup processes on military bases. The DTSC is the regulatory body that assists in developing the appropriate cleanup plan and oversees the project per the state’s interests. The Navy, as primary agency in charge of cleanups on naval bases, hires contractors to carry out some of the phases of the cleanups and provides funds both to the state and private contractors. The cleanup projects span over several years and are carried out in particular phases. Occasionally, early documents in certain phases are reviewed depending on new information or new technology available. As we understand your facts, the cleanup projects are governed by the over-arching directive in the National Contingency Plan and are separable into unique phases of the project.

As a toxicologist for DTSC, you reviewed risk assessments that the Navy submitted as part of the cleanup of military bases. You advised the DTSC Project Manager on the technical merits of the applicable document regarding the cleanup, you reviewed risk assessments, and attended project meetings. Now that you are retired from that position, you are working as a toxicologist for CH2M Hill, Inc. (“CH2M Hill”) and in particular, are working on a cleanup at Point Mugu.

ANALYSIS

The Act contains three main post-governmental restrictions on individuals who have recently left, or are planning to leave, public service:

- **One Year Ban:** This rule 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 rule 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 in while in state service (see Sections 87401-87402, Regulation 18741.1); and

- **Restrictions on Negotiating Prospective Employment:** This rule places restrictions on a public official who is negotiating or has any arrangement concerning prospective employment (Section 87407, Regulation 18747).

Because you left state service more than one year ago and your question specifically involves restrictions pertaining to the permanent ban provisions of the Act, we only discuss that particular restriction.

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.² (Sections 87401 and 87402.) In other words, a public official may never “switch sides” in a proceeding after leaving state service. Sections 87401 and 87402 provide:

“No former state administrative official, after the termination of his or her employment or term of office, shall for compensation act as agent or attorney for, or otherwise represent, any other person (other than the State of California) before any court or state administrative agency or any officer or employee thereof by making any formal or informal appearance, or by making any oral or written communication with the intent to influence, in connection with any judicial, quasi-judicial or other proceeding if both of the following apply:

(a) The State of California is a party or has a direct and substantial interest.

(b) The proceeding is one in which the former state administrative official participated.” (Section 87401.)

“No former state administrative official, after the termination of his or her employment or term of office shall for compensation aid, advise, counsel, consult or assist in representing any other person (except the State of California) in any proceeding in which the official would be prohibited from appearing under Section 87401.” (Section 87402.)

Section 87400 defines “state administrative agency” as “every state office, department, division, bureau, board and commission, but does not include the Legislature, the courts or any agency in the judicial branch of government.” A “state administrative official” is defined under this section as “every member, officer, employee or consultant of a state administrative agency

² Section 87400(b) defines a “state administrative official” as a 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.

who as part of his or her official responsibilities engages in any judicial, quasi-judicial or other proceeding in other than a purely secretarial or ministerial capacity.”

As a state employee with the DTSC subject to Form 700 filing, you are a former state administrative official for purposes of the Act. You are therefore subject to the permanent ban. (Section 87400(b).)

Proceedings

Section 87400(c) defines “judicial, quasi-judicial or other proceeding” to include:

“. . . 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, including but not limited to any proceeding governed by Chapter 5 (commencing with Section 11500) of Division 3 of Title 2 of the Government Code.”

It includes a proceeding in which state administrative officials participate, but leave state employment before the proceeding concludes.

Participation

Section 87400(d) defines “participated” as meaning “to have taken part personally and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation or use of confidential information as an officer or employee, but excluding approval, disapproval or rendering of legal advisory opinions to departmental agency staff which do not involve a specific party or parties.”

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 the decision; advises or makes recommendations to the decision maker, either directly or without significant intervening substantive review; conducts research, makes an investigation, or prepares or presents any report, analysis or opinion, orally or in writing, which requires the exercise of judgment on the part of the employee and the purpose of which is to influence the decision.” (Regulation 18702.2, copy enclosed.)

Based on your facts, you participated in a proceeding when you submitted recommendations and analyses of procedures for the Point Mugu cleanup. You were involved in various phases as the project developed, and it is on-going. This participation bars you from appearing before your prior agency relative to this proceeding and from giving advice to your new employer with regard to this proceeding. The key question, however, is whether the “proceeding” continues with the cleanup or whether there is a “new proceeding.”

New Proceeding

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 participated. A "new" proceeding not subject to the permanent ban typically involves different parties, a different subject matter, or different factual or legal issues from those considered in previous proceedings. (*Donovan* Advice Letter, No. I-03-119.) We have found generally that proceedings to draft a plan or agreement are different from proceedings involving implementation of the same plan or agreement, or to amend the plan or agreement. For instance, the Commission considers the application, drafting and awarding of a contract, license or approval to be a proceeding separate from the monitoring and performance or implementation of the contract, license or approval. (*Blonien* Advice Letter, No. A-89-463; Reg. 18741.1.)

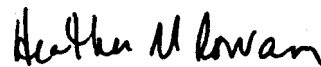
Your facts suggest that the cleanup project at Point Mugu on which you worked during your tenure at DTSC and on which you would like to work with CH2M Hill is accomplished in many phases. In some instances, DTSC, CH2M Hill, and the Navy are forced to revisit a decision or phase that was completed earlier when new information or new technology is available. Generally, however, the National Contingency Plan prescribes distinct phases for an environmental cleanup. The nature of the Point Mugu project suggests two results under the permanent ban. In the cases where DTSC or any other entity requests that a recommendation you made while employed with DTSC is revisited, you would be prohibited from participating in that proceeding. In the cases where you, as an employee of CH2M Hill, are engaging in a new, distinct phase of the project, we think this would be a "new proceeding," and the ban would not apply.

This means that you may not aid, advise, counsel, consult or assist in representing CH2M Hill with regard to any aspect of the plan that you completed while at DTSC. This prohibition would extend only to those phases that you participated in while at DTSC and would not prevent you from participating in ongoing phases or the implementation of the plans.

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

Sincerely,

Zackery P. Morazzini
General Counsel



By: Heather M. Rowan
Counsel, Legal Division

HMR:jgl

Enclosure