



FAIR POLITICAL PRACTICES COMMISSION

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November 16, 2011

Lauren Faber
11 Haight Street, #4
San Francisco, CA 94102

Re: Your Request for Informal Assistance
Our file No. I-11-187

Dear Ms. Faber:

This letter responds to your request for advice regarding the post-governmental employment provisions of the Political Reform Act (the "Act").¹ You should not construe this letter as assistance on any conduct that may have already taken place. (See Regulation 18329(b)(8)(A).) In addition, we base this letter 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 request seeks general guidance, we are treating your request as one for informal assistance.²

QUESTION

Does the Act's one-year ban or permanent ban restrict you from advocating for your current, private, employer's interests regarding dealings it has with your former state agency employer?

CONCLUSION

Based on your facts, the one-year ban and permanent ban are implicated, but the specifics of how they apply will depend primarily on your current assignments and past projects.

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), copy enclosed.)

FACTS

You held an exempt, appointed position of Assistant Secretary for Climate Change Programs in the Office of the Secretary at CalEPA for 18 months, until your final day on October 7, 2011. As Assistant Secretary, you held a designated position, worked with CalEPA in an advisory capacity, and assisted with informing CalEPA of the activities, procedures, and policies of CalEPA's subordinate boards. In your job, you did not act as a decision-maker, whether for the Office of the Secretary (and CalEPA) or other related boards.

After leaving CalEPA, you began your new position at an environmental non-profit organization. In this position, you will participate in the organization's strategizing, advocacy, and internal consultation. You might participate in projects concerning CalEPA, including attending meetings, and it is likely that you will advocate your current employer's interests with the boards that fall under CalEPA's umbrella.³

ANALYSIS

Revolving Door: Public officials who leave state service are subject to two types of post-governmental employment provisions under the Act. These are: the permanent ban and the one-year ban. Colloquially, those provisions are known as the "revolving door" provisions.

The Permanent Ban

The permanent ban is a life-time prohibition on former officials from receiving compensation for making an appearance or communication, or for aiding, advising, counseling, consulting, or assisting in representing any other person, other than the State of California, for the purpose of influencing a judicial, quasi-judicial, or other proceeding in which the official participated in while employed by the state. (Regulation 18741.1.)⁴ The permanent ban applies to any "judicial, quasi-judicial, or other proceeding" in which the former employee participated while serving as a state administrative official. Section 87400 provides:

"(c) '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

³ Below we discuss the interplay between CalEPA and its related boards, based on analysis from a prior advice letter we issued. You were unable to provide the details regarding these relationships.

⁴ With regard to the permanent ban, Regulation 18746.4(a) states that "the date on which an official permanently leaves office or employment or takes a leave of absence is the date on which the official is no longer authorized to perform the duties of the office or employment, and the official stops performing those duties, even if the official continues to receive compensation for accrued leave credits."

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.

“(d) ‘Participated’ means 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 or agency staff which do not involve a specific party or parties.”

The permanent ban applies only to proceedings in which you participated while a state administrative official, including proceedings in which you participated, but which were not concluded, at the time you left your governmental position. (*Rist* Advice Letter, No. A-04-187.) “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.)

You have not offered specifics regarding proceedings in which you participated while with CalEPA, other than your work on the cap and trade regulatory system on which you advised the CalEPA Secretary for Climate Change Programs. The California Air Resources Board (under the umbrella of the CalEPA) voted on and passed the cap and trade program. Other than advising your superiors regarding the process, you have not discussed specifically your involvement with this proceeding. Even so, we have found generally that proceedings to draft a plan or agreement are separate from proceedings involving implementing or amending the same plan or agreement. (See *Christopher Advice Letter*, A-11-163.) To the extent that further work is performed on the cap and trade system to implement it, given the information you have provided, further implementation and decisions regarding the adopted regulatory scheme are likely new proceedings. If this is the case, the permanent ban does not apply to this project. Regarding other projects, you will need to apply the rules as stated above.

The One-Year Ban

The “one-year ban” prohibits a state employee from making, for compensation, any formal or informal appearance, or making any oral or written communication, before his or her former agency for the purpose of influencing any administrative or legislative actions⁵ 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 held 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).) The ban applies for twelve months from the date the employee permanently leaves state office or employment.⁶ Accordingly, the one-year ban will apply to you until October 7th of 2012.

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

⁵ For purposes of section 87406, the Act defines “administrative action” and “legislative action” as the following:

“‘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 . . .” (Section 82002(a).)

“‘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.” (Section 82037.)

⁶ For purposes of the one-year ban, the date on which an official permanently leaves office or employment is the date on which the official is no longer authorized to perform the duties of that that office or employment, and stops performing those duties. A person shall not be deemed to have left office permanently because he or she is on a leave of absence or serves as an intermittent employee. However, a person shall be deemed to have left office permanently if the person merely receives compensation for accrued leave credits. (Regulation 18746.4(b))

“principal purpose of supporting, promoting, influencing, modifying, opposing, delaying, or advancing the action or proceeding.”⁷ (Regulation 18746.2.)

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).) The one-year ban could potentially extend to proceedings before CalEPA and the agencies under the umbrella of the CalEPA.

Relationship of CalEPA with its Subordinate Boards, Departments and Commissions

The relationship between your former state agency, CalEPA, and the agencies under its umbrella is therefore integral to this discussion. A designated employee’s state administrative agency means the agency for which he or she worked, or any board or commission under the agency’s control. (Regulation 18746.1.) While you were not able to provide specifics on this issue, we borrow an overview of CalEPA from a prior advice letter, for instructional purposes only. (See *Spagnole Advice Letter*, No. I-00-145.)

Cal/EPA is a cabinet-level agency, composed of six subordinate entities, three of which are semi-autonomous and three of which work directly for the Secretary. The three entities that work directly for the Secretary are headed by directors appointed by the Governor.

The three semi-autonomous entities are the Air Resources Board (ARB), the State Water Resources Control Board, (SWRCB) and the Integrated Waste Management Board (IWMB). The Governor appoints all the members to the ARB and the SWRCB while the legislature appoints two of the six members of the IWMB. All three of these boards operate “independently” from the Office of the Secretary; they conduct all their meetings in public, have recorded votes, and administer all their own activities. The only oversight the agency secretary has over the three boards lies in the budget and opportunities for policy input through gubernatorial appointees. (See *Spagnole, supra.*)

We have previously concluded that a former employee of the Cal/EPA (who worked in the office of the Secretary) was banned for one year from communicating with any person before Cal/EPA or any of its subordinate agencies. (See, e.g., *Spagnole, supra.*) Accordingly, you may not for one year, for compensation, act as representative or agent for any person before Cal/EPA or any of its subordinate agencies for the purpose of influencing administrative or legislative action, or 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. (Section 87406.)

⁷ 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.

Not all communications are prohibited by the one-year ban, however. 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 or employer's behalf to be submitted to the agency so long as the former employee is not identified in connection with the 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.)

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

Sincerely,

Zackery P. Morazzini
General Counsel



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