



FAIR POLITICAL PRACTICES COMMISSION

428 J Street • Suite 620 • Sacramento, CA 95814-2329

(916) 322-5660 • Fax (916) 322-0886

December 29, 2011

Mark Stephenson
316 17th Street
Pacific Grove, CA 93950

**RE: Your Request for Advice
Our File No. A-11-197**

Dear Mr. Stephenson:

This letter responds to your follow-up 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 based solely on the provisions of the Act. We therefore offer no opinion on the application, if any, of other post-governmental employment laws such as Public Contract Code Section 10411.

QUESTION

May you, after retiring from the State of California Department of Fish and Game (DFG), work for to implement an existing contract with DFG?

CONCLUSION

One Year Ban: The one-year ban only restricts your activities to the extent that you are making an appearance or communication for the purpose of influencing a legislative or administrative action, or an 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. However, appearances or communications, made as part of "services performed to administer,

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.

implement, or fulfill the requirements of an existing permit, license, grant, contract, or sale agreement are not prohibited.

Permanent Ban: It appears your prospective employment will not involve formal or informal appearances, communications, or aiding, advising, counseling, consulting, or assisting in representing your new employer to influence any judicial, quasi-judicial, or other proceeding. However, if your new duties do involve influencing any judicial, quasi-judicial, or other proceeding in which you participated, the permanent ban would apply.

FACTS

You currently work for DFG and are involved in environmental research work. Your position is designated in the agency's conflict of interest code. As a state employee, you managed a DFG subcontract with San Jose State University Research Fund (SJSURF). In this capacity you supervised DFG employees in collecting and analyzing samples of contaminants.

Currently, you are considering retiring and working for the SJSURF. You are considering working specifically on a contract between the SJSURF and the Department of Water Resources (DWR). However, the project also includes a subcontract between SJSURF and DFG.

In your December 11, 2011 letter supplementing your facts you noted:

- SJSURF is in the process of investigating whether they agree they are a public agency under the Act and will request advice in the near future.
- You wish to start employment with SJSURF on January 15, 2012 on a contract between SJSURF and the State Water Resources Control Board (SWRCB) called SWAMP state. The SWAMP State project is a pollution assessment project that entails collecting and analyzing samples of contaminants.
- Rusty Fairey is the principle investigator on the project for SJSURF and has written a subcontract between SJSURF and DFG for collection and analysis for about 10 years.
- SWRCB is providing funding to SJSURF for the project.
- While employed at DFG, you never solicited funds from SWRCB for SJSURF for this projects and are named in any of the contracts.
- On the portion of funds that are subcontracted to DFG, you manage the DFG subcontract and supervise the DFG employees doing the collection and analysis.
- On the portion of the funds that Mr. Fairey directs to an SJSURF account for DFG, you advise SJSURF administration on the set up of the account and advise the administration staff as to the expenses.

- You have helped manage this grant because of your involvement in the university research collaborative. For the last 30 years, you have helped build a collaborative research team of State and University Scientists called the Marine Pollution Studies Group.
- In addition to your DFG responsibilities of supervising four employees and securing state grants to support the DFG group, you co-manage the University part of the collaboration with Mr. Fairey and the director of the Moss Landing Marine Labs.
- However, you stated that the amount of time you have spent on the SWAMP State contract in the past is minimal -- about 1% of your workload.

ANALYSIS

Under the Act, public officials who leave state service are subject to two types of post-governmental employment provisions known as the permanent and one-year bans. 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. (See Regulation 18747.) Colloquially, these provisions are known as the “revolving door” prohibitions.

One-Year Ban

The “one-year ban” prohibits a former 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 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).) The ban applies for twelve months from the date the employee permanently leaves state office or employment. 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).)

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.)

Thus, the one-year ban only restricts your activities to the extent that you are making an appearance or communication for the purpose of influencing a legislative or administrative action, or an 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. Appearances or communications, 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.)

Accordingly, while you may not propose or modify the terms of the design funding agreement or the construction funding agreement for the SBFCA’s project, or the funding agreement related to the separate federal study of levee, you may communicate or appear before the DWR for the limited purposes of implementing an executed agreement. For instance, once an agreement is executed, you would not be prohibited from communicating or appearing before the DWR to report compliance with the terms of the agreement or to seek clarification of existing contractual terms so long as you are not seeking to modify the terms.

Permanent Ban

The “permanent ban” prohibits a former state employee from “switching sides” and participating, for compensation, in any quasi judicial or similar proceedings 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. (Sections 87401 and 87402; Regulation 18741.1.) The permanent ban applies when an official has permanently left or takes a leave of absence from any particular office or employment. (Regulation 18741.1(a)(1).)

The permanent ban is a lifetime ban and applies to any formal or informal appearance or any oral or written communication -- or aiding, advising, counseling, consulting, or assisting in representing any other person, other than the State of California, in an appearance or communication--made with the intent to influence 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).) 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).)

In some cases your work on the same project with a private sector employer may be such that your activities do not constitute formal or informal appearance or any oral or written communication -- or aiding, advising, counseling, consulting, or assisting in representing any other person, in an appearance or communication--made with the intent to influence any judicial, quasi-judicial, or other proceeding in which you participated. You note that your role with SJSURF on the SWAMP State project entails collecting and analyzing samples of contaminants (or supervising SJSURF staff that does the actual collection work). So long as this is the case, it appears your new duties with your prospective employment will not involve influencing any judicial, quasi-judicial, or other proceeding in which you participated. If this is the case, the permanent ban would not apply.

Negotiating Prospective Employment

Because you are still employed at DFG, we are also providing a general discussion on the Act's rule that prohibits a public official from using his or her state position to make any decisions that unduly benefit the organization that is hiring the official. Section 87407 states:

“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.”

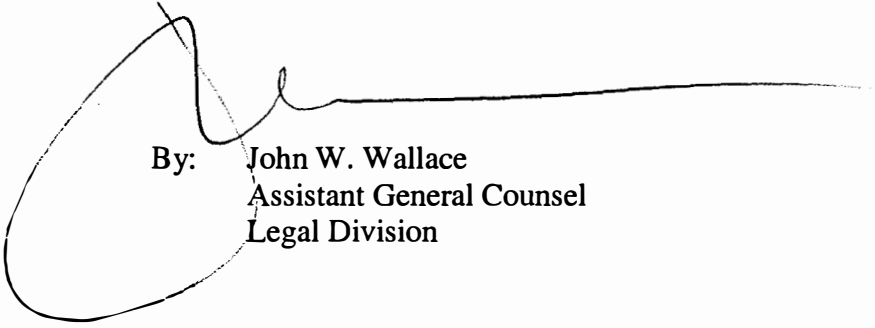
A public official is “negotiating” employment “when he or she interviews or discusses an offer of employment with an employer or his or her agent.” (Regulation 18747(c)(1).) A public official has an “arrangement” concerning prospective employment when he or she accepts an offer of employment. (Regulation 18747(c)(2).)

If you have “negotiated” prospective employment or have made an “arrangement” regarding prospective employment with the SJSURF, you are prohibited under Section 87407 from making, participating in making, or using your official position to influence any governmental decisions “directly relating” to the SJSURF. A governmental decision “directly relates” to a prospective employer if the public official knows or has reason to know that the employer, or the employer’s agent, has either (1) initiated the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or (2) is a named party in, or subject of, the proceeding. (Regulations 18704.1(a) and 18747(b)(1).)

A governmental decision also “directly relates” to a prospective employer if the public official knows or has reason to know that it is reasonably foreseeable that the financial effect of the decision on a prospective employer is material. The financial effect of a decision on a prospective employer is material if the effect meets the materiality thresholds established under Regulation 18705.1(c) for a business entity, Regulation 18705.3(b)(2) for a nonprofit organization, or Regulation 18705.3(b)(3) for an individual. (Regulation 18747(b)(2).)

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

Sincerely,
Zackery P. Morazzini



By: John W. Wallace
Assistant General Counsel
Legal Division

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