



FAIR POLITICAL PRACTICES COMMISSION

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

(916) 322-5660 • Fax (916) 322-0886

April 6, 2015

Mike Hill, M.S.
Althouse and Meade, Inc.
Biological and Environmental Services
1602 Spring Street
Paso Robles, CA 93446

Re: Your Request for Advice
Our File No. A-15-051

Dear Mr. Hill:

This letter responds to your request for advice regarding the “revolving door” provisions of the Political Reform Act (the “Act”).¹ Please note that we are only providing advice under the conflict of interest provisions of the Act and not under other general conflict of interest prohibitions such as common law conflict of interest or Section 1090.

QUESTION

Does the permanent ban in Section 87400 et seq. prohibit you from representing (or aiding, advising, counseling, consulting, or assisting) an individual in responding to a California Department of Fish and Wildlife (“CDFW”) complaint despite having prepared a damage assessment report on behalf of CDFW against the same individual in 2004 in connection with a different but similar violation?

CONCLUSION

The permanent ban in Section 87400 et seq. does not apply to the 2014 complaint because it is a new proceeding.

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 were employed as an Environmental Scientist by CDFW until April 22, 2011. During your tenure with CDFW, your duties included assisting enforcement staff by preparing natural resources injury assessments in cases such as unpermitted modifications of streams (Fish and Game Code Section 1602) or pollution cases (Fish and Game Code Section 5650(a)(6)).

On July 30, 2004, you accompanied enforcement personnel to a suspected violation that occurred on the Salinas River near the community of Templeton, San Luis Obispo County. You subsequently prepared a damage assessment describing the damage that had been done to the Salinas River and adjacent habitat. That damage assessment was used in the prosecution of the suspect, Mr. Richard Baddley.

You stated that you had no contact with Mr. Baddley since the 2004 matter that was resolved in 2005. However, in March 2015, you were contacted by an attorney representing Mr. Baddley in a similar but separate violation involving Fish and Game Code Sections 1602 and 5650(a)(6). In 2014, Mr. Baddley was found to be illegally modifying a section of the Salinas River near Templeton and received a letter from CDFW stating that he must submit a notification (an application) for a streambed alteration agreement or face prosecution. The letter also requires Mr. Baddley to include a proposal for restoring habitat in this or a nearby area to offset the impacts caused by his illegal activity.

Mr. Baddley's attorney requested your assistance in preparing both the application for the permit and the restoration proposal for the 2014 violation that you stated is a different but similar matter from that which occurred in 2004.

ANALYSIS

Since you left your former state employer in 2011, we only discuss the permanent ban of Section 87400 et seq.

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. (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).)

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).) A former state official who held a management position in a state administrative agency is deemed to have participated in a proceeding if: (1) the proceeding was pending before the agency during his or her tenure, and (2) the proceeding was under his or her supervisory authority. (Section 87400(d); Regulation 18741.1(a)(4).) However, proceedings are not under an official’s “supervisory authority” merely because the supervisor is responsible for the general oversight of the administrative actions or functions of a program, where the responsibilities concerning the specific or final review of the proceedings are expressly delegated to other persons in the agency’s structure and the supervisor is not involved in the actual proceedings. (Regulation 18741.1(a)(4); see also *In re Lucas* (2000) 14 FPPC Ops. 15.)

Furthermore, “[t]he 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.)

Ultimately, whether the 2014 is a “new proceeding” is determined by the facts. Under your facts, the 2014 violation involves the same individual, but a different event. While it is the same or similar to what occurred in 2004, it is not a “continuation” of the 2004 proceeding. Therefore, the permanent would not apply to your representation of Mr. Baddley in the 2014 proceeding.

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

Sincerely,



John W. Wallace
Assistant General Counsel

JWW:jgl