



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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June 26, 2015

John Courtis
3237 Conquistador Way
Davis, CA 95618

Re: Your Request for Informal Assistance
Our File No. I-15-095

Dear Mr. Courtis:

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 post governmental employment provisions of the Act. We do not provide advice on other restrictions, such as those governed by the common law and Public Contract Code Section 10411.

Because your questions are general in nature, we are treating this as a request for informal assistance.²

QUESTION

What restrictions or limitations will be placed on your future employment opportunities as a result of your current employment with the California Air Resources Board (the "ARB")?

CONCLUSION

Your future employment opportunities will be restricted by both the Act's one-year ban and the permanent ban on switching sides. In addition, as a current state employee you are also prohibited from making, participating in making, or using your position to influence decisions affecting persons with whom you may be negotiating employment, or have any arrangement concerning employment.

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. (Regulation 18329(c).)

FACTS

At the end of June 2015, you will be retiring from your current position as Supervisor I of the Alternative Fuels section at the ARB. In your position, you supervise staff, as well as make and participate in making decisions about the development and implementation of the Low Carbon Fuel Standard (a fuels regulation).

After your retirement, you will begin searching for new employment or consulting opportunities in a number of areas. These potential opportunities include:

1. Advising fuel producers on compliance strategies with the fuels regulations in California;
2. Representing fuel producers in front of state agencies outside the ARB;
3. Representing fuel producers in front of the ARB;
4. Advising non-governmental organizations (“NGOs”) on California fuels regulations;
5. Representing NGOs in front of the ARB or other state agencies;
6. Working for other state or local agencies (besides the ARB) on fuel issues;
7. Participating in research proposals submitted to the ARB or on contracts with the ARB;
8. Teaming with other consultants to work on California fuel issues;
9. Advising or consulting with technology companies on technology issues relating to fuels;
10. Advising fuel producers on strategies for compliance with fuels regulations outside of California;
11. Representing fuel producers on fuel issues in front of state agencies outside of California;
12. Advising or representing NGOs on fuel issues outside of California;
13. Advising or working with United States Environmental Protection Agency (“USEPA”) on fuel issues, and potentially participating in USEPA/ARB combined activities;
14. Advising or consulting with technology companies on fuel issues.

ANALYSIS

Public officials who leave state service are subject to two types of post-governmental employment provisions under the Act: the one-year ban and the permanent ban. In addition, Sections 87407 and 87100 prohibit officials from making, participating in making, or using their position to influence decisions affecting persons with whom they are negotiating prospective employment, or have any arrangement concerning employment. These provisions are commonly referred to 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)(4).) The ban applies for 12 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).)

In contrast to the permanent ban, which only applies to certain matters involving specific parties such as "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 "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. (*Ibid.*)

Finally, appearances and communications are prohibited only if they are (1) before a state agency that the public official worked for or represented, (2) before 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, or (3) before any state agency subject to the direction and control of the Governor, if the official was a designated employee of the Governor's office during the twelve months before leaving state office or employment. (Regulation 18746.1(b)(6).)

Are you covered: Although you did not indicate whether you file an annual Statement of Economic Interests (Form 700), the fact that you work as a Supervisor I managing the Alternative Fuels section indicates that this position should be designated in the ARB's conflict-of-interest code.³ Positions that make or participate in making governmental decisions (such as developing and implementing a fuel regulation like the Low Carbon Fuel Standard) should be designated in their agencies conflict-of-interest code, and because of your level of responsibility, we assume your position is included in your agency's code. You are thus subject to the one-year ban.

For what period does it apply: The one-year ban will begin to run from the date that you permanently leave your current position. 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 the office or employment, and stops performing those duties, including making, participating in making, or attempting to use his or her official position to influence any governmental decision." (Regulation 18746.4(b).)

³ If your position has decision-making authority, your agency is required to "designate" it in the agency's conflict of interest code, requiring you to file a statement of economic interests. You should discuss your reporting responsibilities with your agency. Whether you file a Form 700 or not, you are subject to the Act's conflict-of-interest disqualification rules.

You stated that you will be retiring from your current position at the end of June 2015. If you use any accrued vacation leave or similar leave credits after the time when you are “no longer authorized to perform” your duties, these credits will not affect the date on which you are considered to “permanently leave” your office. (Regulation 18746.4(b).) For example: if your last day at work is June 30, 2015, but you continue to be paid two weeks into July for unused vacation time, the one-year ban will begin July 1, 2015 and run through June 30, 2016.

What conduct is banned: Under the one-year ban, you will be prohibited for a one-year period from making appearances and communications before the ARB, or any other state agency “which budget, personnel, and other operations are subject to the control” of the ARB, on behalf of a new employer, if 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. You will not be prohibited, however, from advising or assisting a new employer behind the scenes so long as you are not identified in connection with any appearance before or communication with the ARB.

Turning to the potential employment opportunities referenced in your letter, the one-year ban would prohibit you from representing an employer or client in front of the ARB for twelve months from the date you permanently left state employment. The one-year ban also prohibits you from appearing before or communicating with agencies “which budget, personnel, and other operations are subject to the control” of the ARB. With respect to your proposed employment opportunities, this means that representing an employer or client in front of a state agency other than the ARB will be prohibited *if* the agency in question is subject to the control of ARB.

The one-year ban does not prohibit advising or assisting employers or clients on issues related to your previous agency, as long as you are not identified in connection with any appearance before or communication with the ARB. Therefore, you will not be prohibited from advising or consulting with employers or clients on fuel regulations, compliance strategies, or related technological issues. You will not be prohibited from working on research proposals submitted to the ARB as long as you are not identified in connection with the proposal when it is presented to the ARB. Similarly, you will not be prohibited from teaming with other consultants on fuel issues. The one-year ban will not prohibit you from working on fuel issues for other state or local agencies beside the ARB. The one-year ban will also not prohibit you from working on fuel issues in other states or appearing before agencies of other states. However, appearing before or communicating with the ARB in connection with any of these potential jobs will bring the work within the prohibition of the one-year ban.

Even though some of your proposed employment opportunities are not prohibited by the one-year ban, the permanent ban applies to all “proceedings” in which you participated while in state service.

Permanent Ban

The “permanent ban” prohibits a former state employee from “switching sides” and participating, for compensation, in certain proceedings involving the State of California and other

specific parties, or assisting 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.)

While this letter has detailed the general provisions of the permanent ban for your review, you have not provided any information related to your participation in any particular proceeding while employed with the ARB. To apply the permanent ban to your situation, you need to determine if any of potential employment opportunities involve a proceeding in which you previously participated. (Regulation 18741.1(a)(4).)

Section 87407. Influencing Prospective Employment

A public official may negotiate and accept an offer of future employment before leaving his or her current position. Section 87407, however, is designed to ensure that the official does not use his or her position to make any decisions that unduly benefit the entity that hires 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).)

Once you have negotiated prospective employment or have made an arrangement regarding prospective employment, 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 prospective employer. A governmental decision directly relates to a prospective employer, for instance, if the prospective employer is a named party in, or the subject of, a governmental decision before the official or the official’s agency because the decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the prospective employer or involves any decision affecting the prospective employer’s real property. (Regulation 18747.)⁴

You indicated that you will begin searching for new employment opportunities after retiring from your current position at the ARB. As long as you do not begin “negotiating” employment or enter into an “arrangement” concerning prospective employment before leaving your position at ARB, you need not worry about Section 87407. Please note, however, that this section does apply while you are still working as a public official.

⁴ Note that Section 87407 applies in addition to the standard conflict of interest rule in Section 87100. Also note that Regulation 18747 is currently pending with the Office of Administrative Law with nonsubstantive amendments. The revised regulation is available on our website at <http://fpnc.ca.gov/legal/nonsubstantive/18747.pdf>.

If you need additional assistance in determining whether you may take part in any specific decision that may affect a prospective employer, we suggest you seek further advice, providing all relevant facts relating to the decision.

Sincerely,

Hyla P. Wagner
General Counsel

A handwritten signature in black ink, appearing to read "Neil Patrick Clark", written in a cursive style.

By: Neil Patrick Clark
Legal Intern, Legal Division

NPC:jgl