



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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October 15, 2018

Steven G. Churchwell, Esq.
Churchwell White LLP
1414 K Street, 3rd Floor
Sacramento, CA 95814

Re: Your Request for Advice
Our File No. I-18-159

Dear Mr. Churchwell:

This letter responds to your request on behalf of Len Welsh for advice regarding the revolving door provisions of the Political Reform Act (“Act”).¹ Please note that we are only providing advice under those provisions of the Act. Because your questions are general in nature and do not involve specific governmental decisions, we can provide you only with informal assistance.²

Also, note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71); any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

QUESTION

Do the Act’s revolving door provisions apply to a former unpaid retired annuitant from the Department of Industrial Relations (“DIR”)?

CONCLUSION

Yes. The Act’s one-year ban prohibits the former retired annuitant from appearing before or communicating with DIR, the Division of Occupational Safety and Health (“DOSH”), or any other DIR divisions within the department, for compensation and 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 for a period of one year from the date he ceased employment with an agency. Additionally,

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).)

the Act's permanent ban prohibits the former retired annuitant from participating in any proceeding involving his former agency or assisting others in such a proceeding if the proceeding is one in which he participated while employed by the state.³

FACTS AS PROVIDED BY THE REQUESTOR

Your law firm represents Mr. Len Welsh. Mr. Welsh was a state employee for 23 years, retiring in June 2012. At the time of his retirement, he was employed as Counsel to the Director of DIR.

Mr. Welsh was hired by DIR as a retired annuitant on December 27, 2017. He did not begin working until January 2018. During his entire tenure, he worked exclusively on personnel issues involving employees who work in the DIR Legal Unit.

He had no involvement in the affairs of any other division of DIR. Mr. Welsh spent a total of approximately 180 hours working on assignments in this role over a three-month period – January, February, and March 2018.

His last day of performing any tasks as a retired annuitant was March 31, 2018. He did not have any work assignments from this date on and formally resigned on May 14, 2018. After resigning, Mr. Welsh informed DIR in writing that he did not wish to be compensated for his service as a retired annuitant.

According to DIR's conflict of interest code, Mr. Welsh's position is listed as a designated employee.

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. 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. (Section 87406; Regulation 18746.1.)

³ As an attorney, we note that the one-year ban does not prohibit Mr. Welsh from representing clients as an attorney before a court of law or an administrative law judge because the decision is not before his former agency. (*Stiffler* Advice Letter, No. I-08-048.) Moreover, once litigation or an adjudicatory investigation has commenced, we have previously determined that the one-year ban does not preclude an attorney from representing a client in prehearing discussions with the attorney's former agency, such as settlement negotiations. (*Foreman* Advice Letter, No. I-13-063.) However, to the extent that Mr. Welsh previously participated in the litigation or adjudicatory matter as a state employee, the permanent ban may still apply.

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 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).) When an employee returns to state employment as a retired annuitant in a position that is designated in the agency's conflict of interest code, the one-year ban begins anew once the employee permanently leaves the retired annuitant position. (See *Anderson* Advice Letter, No. A-14-184.)

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 to 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.*)

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 "whose 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)(C).)

As a state official designated by DIR's conflict-of-interest code, Mr. Welsh was a designated employee as defined in Section 82019. Therefore, for one year after leaving DIR, he may not communicate with his former agency, DOSH, or any division of DIR in an attempt to influence any transaction involving legislative or administrative action⁴ or other 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."⁵ (See *Anderson* Advice Letter, No. A-14-184 [stating that "[w]hen

⁴ For purposes of Section 87406, the Act defines "administrative 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" is defined as 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. (Section 82037)

⁵ Communications restricted by the one-year ban include any formal or informal appearance or oral or written communication made to influence legislative or administrative action or any action on a proceeding. (Section 87406(d)(1).) These communications include, but are not limited to, conversing directly or by telephone, corresponding by writing or e-mail, attending a meeting, and delivering or sending any communication. (Regulation 18746.2(a).)

an employee returns to state employment as a retired annuitant that is designated in the agency's conflict of interest code, the one-year ban begins anew, when the employee permanently leaves the retired annuitant position"].)

Permanent Ban:

The "permanent ban" prohibits a former state administrative official from "switching sides" and participating, for compensation, in a certain proceeding 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 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 Mr. Welsh participated while he 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).) Thus, the permanent ban covers proceedings that affect the rights or claims of specific parties. (*Lowry Advice Letter*, No. I-08-053.) It does not apply to those that involve the making of rules or policies of general applicability. (*Beale Advice Letter*, No. A-00-146.)

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).)

As a former retired annuitant designated in the DIR's conflict of interest code, the permanent ban applies to Mr. Welsh. However, you have not identified any specific proceeding in which Mr. Welsh previously participated as an employee of the DIR. Accordingly, we cannot offer you any additional advice regarding the permanent ban outside of the general assistance provided above. If you need additional assistance regarding the permanent ban, you or Mr. Welsh should seek additional advice describing the proceeding in which he wishes to participate and the extent of his past involvement.

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

Sincerely,

Dave Bainbridge
General Counsel

A handwritten signature in cursive script, appearing to read "Ryan P. O'Connor".

By: Ryan P. O'Connor
Counsel, Legal Division

RPOC:jgl