



FAIR POLITICAL PRACTICES COMMISSION

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July 24, 2002

Steven K. Chan
1567 Dunswell Avenue
Hacienda Heights, CA 91745

**Re: Your Request for Informal Assistance
Our File No. I-02-084**

Dear Mr. Chan:

This letter is in response to your request for advice regarding the revolving door provisions of the Political Reform Act (the "Act").¹ We are treating your request as one for informal assistance because you are not requesting advice about a particular proceeding. (Regulations (b)(8)(C) and (D).)²

QUESTIONS

1. Under the lifetime ban, would you, as a Supervising Tax Auditor I at the Board of Equalization ("BOE"), be prohibited from appearing before BOE and their auditors regarding tax audits, taxpayers' delinquency, or permit revocation matters?
2. Under the one-year ban, would you, as a Supervising Tax Auditor I at BOE, be prohibited from appearing before BOE and their auditors regarding tax audits, taxpayers' delinquency, or permit revocation matters?

CONCLUSIONS

1. Yes, under the permanent ban, you would be prohibited from aiding, advising, representing or otherwise assisting a taxpayer regarding any tax audits or other matters in which you participated or supervised as a state employee. But, the lifetime ban would not prohibit you from representing the same taxpayer on a different audit with BOE, or in any proceeding in which you were not involved.
2. No, the one-year ban provisions of the Act do not regulate tax audits.

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

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 are currently working as an audit supervisor for the State Board of Equalization ("BOE"). The position is titled, "Supervising Tax Auditor I." You are a first-line supervisor. Your main duty is to supervise tax auditors in conducting tax audits to ensure that taxpayers comply with the tax law and report the correct amount of sales tax.

Your questions concern whether, upon your terminating employment with the BOE, sections 87401 and 87406 prohibit your representation of taxpayers in their sales tax audits. Representation would entail appearances before the BOE's auditors and sometimes, before the BOE itself, regarding tax audit matters, and occasionally communicating with the BOE members regarding taxpayers' delinquent or permit revocation matters, issues not related to tax audit.

ANALYSIS

The Act has three main post-governmental employment restrictions on individuals who are considering leaving or who have left state service:

- 1) Restrictions on a state employee who is negotiating prospective employment (section 87407);³
- 2) A "one-year ban" prohibiting a state employee from communicating with his or her former agency to influence the agency's administrative or legislative action (section 87406); and
- 3) A "permanent ban" barring a state employee from "switching sides" in any specific proceeding between two parties that the employee worked on while in state service (sections 87400-87405).

1. Negotiating Prospective Employment and Decisions Relating to a Prospective Employer.

The Act and regulations contemplate that a public official may negotiate and accept an offer of future employment before leaving his or her current state position. However, the Act is designed to ensure that an official does not use his or her state government position to make any decisions that unduly benefit the firm that is hiring the official. Section 87407 provides:

"No state administrative official, elected state officer, or designated employee of the Legislature shall make, participate in making, or use his or her official position to influence, any governmental decision directly

³ Regulation 18747(d)(3) states that this prohibition does not apply if the prospective employer is a state, local, or federal governmental agency.

relating to any person with whom he or she is negotiating, or has any arrangement concerning, prospective employment.”

A person is a “prospective employer” if the state official negotiates prospective employment with that person. (Regulation 18747(c).) A state official “negotiates” employment “when he or she interviews or discusses an offer of employment with an employer or his or her agent.” (Regulation 18747(c)(1).) You have indicated that you wish to represent taxpayers in their sales tax audits as well as tax delinquency and permit revocation issues. Accordingly, you may not make, participate in making, or use your official position to influence any governmental decisions directly relating to those (or any) prospective employers. A decision “directly relates” to a prospective employer when:

- The prospective employer “[i]nitiates a proceeding in which the decision will be made by filing an application, claim, appeal or similar request or;”
- The prospective employer is a named party in, or is the subject of, a proceeding in which the decision will be made;
- The proceeding “involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with,” the prospective employer; or (Regulation 18704.1(a).)
- It is reasonably foreseeable that the governmental decision will have a material financial effect on the prospective employer (see regulation 18705.3(b)(3)). (Regulation 18747(b)(2).)

We have enclosed the Commission document entitled “Leaving Your State Job? Post-Employment Restrictions May Affect You” to provide you with additional guidance. In your case, you would need to look at each prospective client, if you are in negotiations for employment, and evaluate them under each of these factors.

Officials who *leave* state service are subject to two types of restrictions under the Act. The first is a permanent ban, and the second is a one-year prohibition.

2. Permanent Ban on “Switching Sides”

Sections 87401 and 87402 (collectively, the “permanent ban”) prohibit former state administrative officials from advising or representing any person for compensation in any judicial or other proceeding in which the official participated while in state service. Specifically, section 87401 provides:

“No former state administrative official, after the termination of his or her employment or term of office, shall for compensation act as agent or attorney for, or otherwise represent, any other person (other than the State of California) before any court or state administrative

agency or any officer or employee thereof by making any formal or informal appearance, or by making any oral or written communication with the intent to influence, in connection with any judicial or quasi-judicial or other proceeding if both of the following apply:

(a) The State of California is a party or has a direct and substantial interest.

(b) The proceeding is one in which the former state administrative official participated.”

In addition, section 87402 prohibits former state administrative officials from being paid to “aid, advise, counsel, consult or assist in representing” any other person in any proceeding in which the official would be prohibited from appearing under section 87401. As a Supervising Tax Auditor I at BOE, you are a “state administrative official” for purposes of the permanent ban. (Section 87400(b).) Therefore, the permanent ban restricts your activities in the private sector.

The permanent ban only applies to “judicial, quasi-judicial or other proceedings” in which you “personally and substantially” participated at BOE. (Section 87400(d).) A “judicial, quasi-judicial or other proceeding” is “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 tax audit proceedings.

A supervisor is deemed to have participated personally and substantially in any proceeding that was pending before the agency under his or her supervisory authority. (Regulation 18741.1(a)(4).) The standard used to determine “supervisory authority” is if the supervisor’s responsibilities rise to the level of “personal and substantial” involvement. (Regulation 18741.1(a)(4); *Lucas* Opinion (2000) 14 FPPC Ops. 15.) In *Lucas*, the Deputy Director of the Sales and Use Tax Department at BOE was found to only have “personal and substantial” involvement in audits that reached the third level of appeal before the actual Board and audits he personally participated in, but not the 20,000 audits that took place each year that did not involve his direct supervision. (*Ibid.*)

If direct supervision is found, “personal and substantial” involvement is broadly construed to include any possible contact the supervisor could have had with the situation. For example, in the *Brown* Advice Letter, No. A-91-033, the Commission considered whether its former Enforcement Division Chief, Roger Brown, could represent the subject of an Enforcement Division matter whose case was opened just prior to the chief’s departure, and on whose file no substantive work had been done during Mr. Brown’s tenure. Neither Mr. Brown nor his staff could recall any involvement by Mr. Brown in the matter during the brief time he was with the agency while the matter was pending. After reconsideration by the Commission, the final advice concluded that Mr. Brown was deemed to have participated because he could have impacted matters handled by his subordinates in ways not evidenced by the file. In your case, you have direct supervisory control over the auditors at BOE, therefore, when you

leave BOE, you may not for compensation assist or represent any person regarding a contract that was pending before your agency under your supervisory authority.

The permanent ban applies throughout the duration of any audit proceeding in which you participated. It does not, however, prohibit you from representing a taxpayer in any **new** proceeding, even though that taxpayer may have been a party to a **previous** proceeding in which you participated. We regard as “new” a proceeding involving different parties, or different factual or legal issues from those considered in previous proceedings. (*Grimm* Advice Letter, No. A-99-086 and *Lucas* Advice Letter, No. A-00-034.) With respect to tax audits, we have advised that any proceeding that began during a public official’s tenure would be subject to the permanent ban. (*Costa* Advice Letter, No. A-98-003.) However, what constitutes the same or different “proceeding” for purposes of these restrictions must be analyzed on a case-by-case basis. Therefore, we cannot provide you with more detail on this question until there is a specific proceeding to analyze. Accordingly, you may not aid, advise, represent or otherwise assist taxpayers with audits you supervised at BOE. However, in the future, you may assist or represent a taxpayer in any **new** proceedings with BOE, except to the extent that the one-year ban applies.

3. The One-Year Ban (Revolving Door Law)

The Act prohibits specified officials, for a period of one year after leaving state service, from being paid to communicate with or appear before their former agency for the purpose of influencing administrative or legislative action, or a specified action or proceeding involving a permit, license, grant, contract or the sale of goods or property. Section 87406 specifically provides that no designated employee of a state administrative agency:

“[F]or a period of one year after leaving office or employment, shall, for compensation, act as agent or attorney for, or otherwise represent, any other person, by making any formal or informal appearance, or by making any oral or written communication, before any state administrative agency, or officer or employee thereof, for which he or she worked or represented during the 12 months before leaving office or employment, if the appearance or communication is 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” (Section 87406(d)(1).)

The one-year period commences when an employee has permanently left state service and is no longer receiving compensation, including compensation for unused vacation time. (Regulation 18746.1(b)(1); *Negrete* Advice Letter, No. A-99-177; *Weil* Advice Letter, No. A-97-247.)

You pose the question whether tax audits and appeals of those audits are “administrative or legislative” actions subject to the one-year ban quoted above. Each of those terms is defined by the Act as follows:

82002. Administrative Action.

“(a) ‘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”

“82037. Legislative Action.

‘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.”

If the tax audits and appeals do not qualify as legislative or administrative action (nor the issuance of a permit, license, grant, contract or sale of goods or property), they will not be covered by the one-year ban.

Section 82002’s definition of “administrative action” includes “quasi- legislative” proceedings. That term is defined, in pertinent part, as follows:

“(a) A proceeding of a state agency is not a quasi-legislative proceeding for the purposes of Government Code Section 82002 if it is any of the following:

(1) A proceeding to determine the rights or duties of a person under existing laws, regulations or policies.

¶...¶

(3) A proceeding to enforce compliance with existing law or to impose sanctions for violations of existing law.”
(Regulation 18202.)

In contrast, the Act defines a “judicial” or “quasi-judicial” proceeding, which is subject not to the one-year ban but to the “permanent ban” restrictions of section 87401, as:

“(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 agency” (Section 87400(c).)

We have concluded in the past that an audit is a “judicial, quasi-judicial or other proceeding” for which the State of California is a party or has a direct and substantial interest, and therefore is subject to the permanent ban provisions of section 87401. (See *Costa* Advice Letter, No. A-98-003.) Additionally, in the *Boyer* Advice Letter, No. I-01-065, we concluded that tax audits were also a “judicial, quasi-judicial or other proceeding” subject to the permanent ban provisions of section 87041. It logically follows that a tax audit, therefore, is not subject to the one-year ban of section 87406.

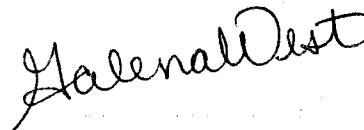
We affirm the conclusion in *Costa* and *Boyer* and agree with you that a tax audit is not a quasi-legislative proceeding which would qualify as an administrative or legislative action subject to the one-year ban. A tax audit, and ensuing appeal, involves the investigation and determination of whether a specific individual has complied with the law governing taxes. As such, it meets the definition of a “judicial proceeding” under section 87400, subdivision (c), and is distinguished from a quasi-legislative proceeding insofar as an audit is a proceeding to enforce compliance with the law and determines the rights or duties of an individual. (Regulation 18202.) Thus, we find representation of a client during an audit subject to the restrictions of Government Code section 87401 (the permanent ban) as opposed to section 87406 (the one-year ban).

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

Sincerely,

Luisa Menchaca
General Counsel

By:



Galena West
Counsel, Legal Division

Enclosures

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