



FAIR POLITICAL PRACTICES COMMISSION

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July 11, 2002

Barbara Brandes
2779 13th Street
Sacramento, CA 95818

Re: Your Request for Advice
Our File No. I-02-134

Dear Ms. Brandes:

This letter is in response to your request for advice regarding the post-governmental employment and conflict-of-interest provisions of the Political Reform Act (the "Act").¹ Since your request asks for general guidance, we are treating it as one for informal assistance.² The Commission does not act as finder of fact when providing assistance; this assistance is based on the facts you provide. (*In re Oglesby* (1975) 1 FPPC Ops.71; Govt. Code § 83114.)

QUESTION

Do the Act's post-employment restrictions and conflict-of-interest provisions presently apply to you in considering future employment with WestEd, a state-certified external evaluator and non-profit organization that contracts with local educational agencies?

CONCLUSION

Yes. You are a designated employee of the California Department of Education ("CDE") and as such, you are a "state administrative official" and "public official" for purposes of the post-employment restrictions and conflict-of-interest provisions, respectively, of the Act. You may not make, participate in making, or use your official position to influence any governmental decision directly relating to any person with whom you are negotiating, or have any arrangement concerning, prospective employment. Similarly, you may not make, participate in making, or influence any

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.)

governmental decision that will have a reasonably foreseeable material financial effect upon any such person.

In addition, should you accept employment with WestEd, you will be subject to the permanent and one-year bans restricting your appearances before, and communications with, CDE and its employees, as discussed below.

FACTS

You are currently an education programs administrator with the California Department of Education ("CDE"), assigned to the School Reform Assistance Office. Your responsibilities primarily involve administration of the external evaluator application process under the Immediate Intervention/Underperforming Schools Program. In this regard, Education Code section 52053.5 directs the superintendent of public instruction to develop and disseminate an application process by which to establish a list of state-approved external evaluators.

Local education agencies with schools in the Immediate Intervention/Underperforming Schools Program are eligible to acquire grants from the CDE. Grant recipients are required to contract with state-approved external evaluators to assist in the planning, implementation and evaluation of remedial action plans utilizing grant funds. Although a grant recipient's selection of an external evaluation must follow a process administered by the CDE, the CDE does not contract with external evaluators or influence local education agencies in the selection of an evaluator.

You are considering retiring from state employment to take a position at WestEd, a nonprofit research, development and service agency based in San Francisco. This position is that of WestEd's director of the California External Evaluator Project. WestEd is a state-approved "external evaluator" which contracts with local educational agencies to assist in planning, implementation and evaluation of action plans for underperforming schools. The position you are considering would oversee WestEd's work as an external evaluator.

ANALYSIS

Post-Employment Restrictions

Influencing Prospective Employment

The Act's post-employment restriction immediately relevant to your circumstances is that found at section 87407:

"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

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

A “state administrative official” is defined in section 87400(b) as “every member, officer, employee or consultant of a state administrative agency who as part of his or her official responsibilities engages in any judicial, quasi-judicial or other proceeding in other than a purely clerical, secretarial or ministerial capacity.” The CDE is a state administrative agency as defined in section 87400(b) and as an education programs administrator for the CDE, you are a state administrative official subject to the post-employment restrictions of the Act.

A state administrative official is considered to be negotiating employment when he or she interviews or discusses an offer of employment with a potential employer or his or her agent. (Regulation 18747(c)(1).) We construe the scheduling, conduct and follow-up of an interview as one continuous process falling under the definition of “negotiating” employment. (*Bonner* Advice Letter, No. I-98-287.) However, the act of sending a resume or application to a specific entity is not considered “negotiating.” Similarly, entertaining informal inquiries about your future plans and receiving expressions of general interest in discussing potential employment opportunities at some point in the future is not considered “negotiating.” (*Id.*) A state administrative official has an arrangement concerning prospective employment when he or she accepts an offer of employment. (Regulation 18747(c)(2).)

You state that you are “considering” and “pursuing” this post-government service employment opportunity. Your letter does not specify the exact nature of your actions, if any, in these regards and we are unable, therefore, to advise you whether you are “negotiating” or have an “arrangement concerning prospective employment” that would restrict your involvement in governmental decisions, pursuant to section 87407. This is a factual question for you to decide. However, for purposes of providing you with advice, we will assume that currently you are negotiating or have an arrangement with WestEd concerning prospective employment.

A government decision directly relates to a prospective employer when:

- 1) The prospective employer initiates a proceeding in which the decision will be made by filing an application, claim, appeal or similar request;
- 2) The prospective employer is a named party in, or is the subject of, a proceeding in which the decision will be made;
- 3) 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
- 4) It is reasonably foreseeable that the governmental decision will have a material financial effect on the prospective employer. (Regulations 18747; 18704.1 and 18705.1; *Schuett* Advice Letter, No. I-02-144.)

One-Year Ban

The Act prohibits a designated employee, 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 any action or proceeding involving the issuance, amendment, awarding or revocation of a permit, license, grant, contract or the sale of goods or property. (Section 87406(d)(1).) An appearance or communication includes, but is not limited to, conversing by telephone or in person, corresponding with in writing or by electronic transmission, attending a meeting, and delivering or sending any communication. (Regulation 18746.2.)

Not all communications to a former state administrative agency employer are prohibited by the one-year ban; it is only when the communication is for the purpose of “influencing” that the communication implicates the one-year ban.³ 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(a).) In contrast, communications made in order to “administer, implement, or fulfill the requirements of an existing permit, license, grant, contract, or sale agreement may be excluded from the [one-year] prohibition[s]... 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); *Hanan* Advice Letter, No. I-00-209; *Billeci* Advice Letter, No. I-00-234.)

On its face, it appears that local agency communications that identify you to the CDE would most likely be offered in context of administering the grant the local agency receives from the CDE. If so, it would not be a communication for the purpose of “influencing” and would not be subject to the one-year ban. (Regulation subdivision 18746.1(b)(5)(A).) On the other hand, if the communication identifies you and is offered for the purpose of affecting the outcome of an action or proceeding, it would be a communication prohibited under the one-year ban. This is a factual question for your future resolution, should you accept employment with WestEd.

Permanent Ban

Sections 87401 and 87402 prohibit former state administrative officials who participated in a judicial, quasi-judicial or other proceeding while employed by a state agency, from being paid to represent or assist in representing another person regarding that same proceeding. A “judicial, quasi-judicial or other proceeding” includes an application or other particular matter involving a specific party or parties in any court or state administrative agency. (Section 87400(c).) WestEd’s application for state-approval as an external evaluator is a proceeding, within the meaning of section 87400(c).

An official is considered to have “participated” in a proceeding if the official was personally and substantially involved in the matter. (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

³ You may, however, prepare or assist in the preparation of WestEd documents knowing the documents will be forwarded to the CDE as long as you are not identified in the document.

during his or her tenure, and (2) any decision regarding the proceeding was made by the official directly or by someone under his or her direct supervision. (Regulation 18741.1(a)(4).) You state that you are an Education Programs Administrator I. It appears, therefore, that you do not occupy a management position within the CDE. However, as an administrator of the external evaluator application process, it appears that you may have been personally and substantially involved in WestEd's application for status as a state-approved external evaluator. If such is the case, you would be subject to the permanent ban *with respect to WestEd's prior application proceeding*.

The permanent ban does not, however, apply to "new" proceedings in which the former employee did not participate. (Section 87401; *Grady* Advice Letter, No. I-99-034.) The Commission considers the application, drafting and awarding of a contract, license or approval to be a proceeding separate from the monitoring and performance of the contract, license or approval. (*Blonien* Advice Letter, No. A-89-463.) Thus, you would not be permanently banned from communicating with the CDE regarding the particular actions WestEd undertakes as an external evaluator under its state approval since these would be "new" proceedings. Such requirements would still have to withstand scrutiny under the one-year ban.

Conflict of Interest

Section 87100 prohibits a public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. The Commission has adopted an eight-step standard analysis for deciding whether an official has a disqualifying conflict of interest. (Regulation 18700, subdivisions (b)(1)-(8).) As an administrator for CDE involved in the external evaluator application process, you are a public official participating in making, and influencing governmental decisions; steps one and two in the standard eight-step conflict-of-interest analysis. (Section 82048; regulations 18702.2(b) and 18702.3(a).)

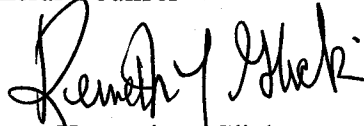
The Act's conflict-of-interest provisions apply only to conflicts of interest arising from economic interests. Among the economic interests that might give rise to a conflict of interest are sources of income, including promised income, which aggregate to \$500 or more within 12 months prior to the decision at issue. (Section 87103(c); regulation 18703.3.) Income is "promised" when there exists a legally enforceable right to the promised income. (Regulation 18703.3.) Should your consideration or pursuit of prospective employment with WestEd provide you with a legally enforceable right to promised income of \$500 or more, WestEd will be a source of income to you. In that event, you would be prohibited by the conflict-of-interest provisions of the Act from making, participating in making, or influencing any governmental decision in your employment with the CDE that would have a reasonably foreseeable material financial effect on WestEd.⁴

⁴ Since it is not clear from your letter whether WestEd is at this time a source of income to you, we will not continue with the remaining steps of our standard analysis. Should you later determine that WestEd, by virtue of a prospective employer relationship to you, is a source of promised income, you may obtain our further advice regarding the applicability of our conflict-of-interest regulations to your

Enclosed you will find the Commission document entitled "Leaving Your State Job? Post-Employment Restrictions May Affect You" to provide you with additional guidance. If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca
General Counsel



By: Kenneth L. Glick
Counsel, Legal Division

Enclosures (3)

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circumstances. In the interim, we are enclosing our publication, "Can I Vote?" which will further inform you regarding the conflict-of-interest provisions of the Act and our standard eight-step analysis thereunder.