



## FAIR POLITICAL PRACTICES COMMISSION

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July 11, 2002

Nyle Baker  
2740 Carnellan Circle  
El Dorado Hills, CA 95762

**Re: Your Request for Advice  
Our File No. A-02-151**

Dear Mr. Baker:

This letter is in response to your request for advice regarding the post-governmental employment provisions of the Political Reform Act (the "Act").<sup>1</sup> The Commission does not act as a finder of fact when providing advice; this advice is based on the facts you provide. (*In re Oglesby* (1975) 1 FPPC Ops. 71; Govt. Code § 83114.)

### QUESTION

Are the Act's post-governmental employment restrictions applicable to your prospective employment in a technical support position with Indiana Chair Frame Co. ("Indiana Chair"), a supplier to the California State Department of Corrections, Prison Industry Authority ("PIA")?

### CONCLUSION

Yes. As a former designated employee of PIA who participated personally and substantially in both the award and performance of a contract between PIA and Indiana Chair, you are prohibited under the permanent ban from doing any work for Indiana Chair with respect to that contract, including aiding or advising others. Further, under the one-year ban, you are prohibited for a period expiring on November 30, 2002 (your anniversary date for separation from state service), from appearing before or communicating with PIA on behalf of Indiana Chair for the purpose of influencing the award by PIA of a new contract to Indiana Chair.

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

## FACTS

On November 30, 2001, you retired from state employment. Formerly, you were employed by PIA as its manager of furniture factories. In that capacity, you were a designated employee under the Department of Corrections' conflict of interest code. As manager of PIA's furniture factories you were involved in PIA's contracting process, including both initial selection and later implementation of the contract.

Indiana Chair is presently a supplier to PIA. Indiana Chair's three-year contract was awarded during your term of employment with PIA and has approximately 18 months before its termination. Indiana Chair is offering you employment in a technical support position. In your new position you would primarily be involved in providing in-house technical support and new product development. You would also act as a technical representative when sales staff visits PIA, and others, to solicit new business.

## ANALYSIS

Public officials who leave state service are subject to two types of post-governmental employment restrictions under the Act. The first is a permanent prohibition on advising or representing any person for compensation in any judicial or other proceeding (including contracts) in which the official participated while in state service. (Section 87401 and section 87402.) The second is a one-year ban on making any appearance for compensation before their former agency, *or officer or employee thereof*, for the purpose of influencing any administrative, legislative or other specified action (including contracts). (Section 87406.)

### *Permanent Ban*

Sections 87401 and 87402 prohibit former state administrative officials<sup>2</sup> who participated in a judicial, quasi-judicial or other proceeding while employed by a state agency, from aiding, advising, counseling, consulting, or assisting in representing any other person, for compensation, regarding that same proceeding. A "judicial, quasi-judicial or other proceeding" includes a contract or other particular matter involving a specific party or parties in any court or state administrative agency. (Section 87400(c).) Because a governmental request for proposal ("RFP") is integral to the execution of a governmental contract whereby specific parties will be identified, we have advised in the past that a governmental RFP is also a "proceeding" under section 87400(c). (*Feber Advice Letter*, No. I-99-104.)

An official is considered to have "participated" in a contract proceeding if the official was personally and substantially involved in the contract. (Section 87400(d).) A

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<sup>2</sup> 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 California Department of Corrections is a state administrative agency as defined in section 87400(b) and as the manager of furniture factories of its PIA, you were a state administrative official. (*Billeci Advice Letter*, No. I-00-234.)

former state official who held a management position in a state administrative agency is deemed to have participated in a contract if: (1) the contract was pending before the agency during his or her tenure, and 2) any decision regarding the contract was made by the official directly or by someone under his or her direct supervision. (Regulation 18741.1(a)(4).) The permanent ban applies throughout the duration of a contract in which the official participated.

The permanent ban does not, however, apply to "new" contracts in which the former employee did not participate. (Section 87401; *Grady* Advice Letter, No. I-99-034.) A new contract is one that is based on new consideration and new terms, even if involving the same parties. (*Ferber* Advice Letter, *supra*; *Anderson* Advice Letter, No. A-98-159.) If a new contract sent out for re-bid is substantially the same as a current contract, however, we have previously advised that the two contracts will be considered the same proceeding for purposes of the permanent ban. (*Feber* Advice Letter and *Anderson* Advice Letter, *supra*.)<sup>3</sup>

In summary, the permanent ban does not prohibit you from performing work for Indiana Chair on its contracts that you did not work on as an employee of PIA, or on a new contract between Indiana Chair and PIA that post-dates your state employment. The Act's permanent ban, however, prohibits you from performing work for Indiana Chair on its existing contract with PIA, or any other contract on which you performed substantial work in your position with PIA. (*Glaab* Advice Letter, No. A-97-341.) This necessarily includes appearing (either in person, orally, or in writing) before PIA with respect to matters under this contract or assisting, through technical support or otherwise, those who appear before PIA with respect to matters under this contract.

#### *One-Year Ban*

In addition to the permanent 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, or contract, or the sale or purchase of goods or property." (Section 87406(d)(1).) A "former agency" includes any state administrative agency the designated employee formerly worked for or represented during the 12-month period before he or she left state service and also includes any agency whose budget, personnel and other operations are controlled by the former agency. (Regulation 18746.1(a)(6).) "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.)

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<sup>3</sup> Although the Commission considers the application, drafting and awarding of a contract to be a proceeding separate from the monitoring and performance of the contract (*Blonien* Advice Letter, No. A-89-463), you state that as a state employee you worked on both the contract award and post-award performance of the contract between Indiana Chair and PIA. Thus, the performance of the contract between Indiana Chair and PIA is not a "new" proceeding in which you have not previously performed substantial work.

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).) "Services performed 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, "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).) If an appearance or communication is otherwise permissible under the foregoing exclusion, it nevertheless may be prohibited under the permanent ban of sections 87401 and 87402. In this regard, while your appearance before or communication with PIA to provide technical support for Indiana Chair's existing contract would not be prohibited under the one-year ban, it would still be prohibited under the permanent ban.

As a technical support representative acting as a member of Indiana Chair's sales team, your appearance before or communications with PIA would involve you, a former designated employee of PIA, in appearing before or communicating with your former state administrative agency employer. The purpose of your appearance or communication would be to influence the award of a new contract between PIA and Indiana Chair, a purpose falling squarely within the prohibition of the one-year ban. Thus, until your 12-month post-employment period expires on November 30, 2002, you may not appear before or communicate with PIA as a technical support representative of Indiana Chair's sales team, in connection with Indiana Chair's efforts to obtain a new contract with PIA.

If a new contract is awarded to Indiana Chair prior to November 30, 2002 (without your appearing before, or communication with, PIA), the exclusion applicable to the one-year ban in regulation 18746.1(b)(5)(A) would allow you to provide technical support for such a contract during the period of the one-year ban, assuming that it is not barred by the permanent ban.<sup>4</sup>

This one-year ban is directed to prohibit your interaction with your former employer. The one-year ban is not directed towards your interaction with your future fellow employees at Indiana Chair. Thus, as a technical support representative you may advise Indiana Chair employees, including members of its sales team who will be appearing before or communicating with PIA, with respect to any matter not covered under the permanent ban, including a new contract between PIA and Indiana Chair.

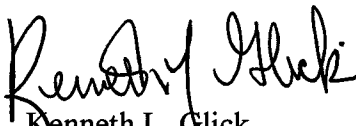
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<sup>4</sup> If the new contract involves the same parties and is merely an extension of, or is substantially the same as, the pre-existing contract we have previously advised that the two contracts will be considered to be the same proceeding for purposes of the permanent ban. (*Ferber Advice Letter*, No. I-99-104; *Anderson Advice Letter*, No. 98-159.)

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

Sincerely,

Luisa Menchaca  
General Counsel

By:   
Kenneth L. Click  
Counsel, Legal Division

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