



FAIR POLITICAL PRACTICES COMMISSION

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March 25, 2003

Bruce A. Kaspari
9513 Ringford Court
Sacramento, CA 95829

**Re: Your Request for Informal Assistance
Our File No. I-03-013**

Dear Mr. Kaspari:

This letter is in response to your request for advice regarding the revolving door provisions of the Political Reform Act (the "Act").¹ Because the facts you have presented are not sufficient to render formal advice, we are treating your request as one for informal assistance (regulation 18329(b)(2)(B)).² Our assistance is based on the facts presented; the Commission does not act as a finder of fact when it provides informal assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

QUESTION

How will the Act's post-employment provisions apply to you, should you be retained by Eclipse Solutions to provide consulting services in connection with the California Child Support Automation Program ("CSAP")?³

CONCLUSION

As a former designated employee of the Department of Justice ("DOJ"), the permanent and one-year bans apply to you. Under the permanent ban, you may not represent Eclipse Solutions before any court or state administrative agency, or any officer or employee thereof, in any judicial, quasi-judicial or other proceeding in which you

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.) In addition, this letter should not be construed as assistance on any conduct that may have already taken place.

³ Initially, you also sought advice regarding your potential involvement in a project being initiated by the Department of Justice's Bureau of Criminal Identification. In a telephone conversation with Commission staff held on March 18, 2003, you clarified that you are no longer under consideration, and are not presently seeking our advice in connection with this program.

participated as a state employee. Unlike the one-year ban, discussed below, the permanent ban may be implicated when you appear before the DOJ or other state administrative agencies.

The one-year ban would prohibit you from representing Eclipse Solutions before the DOJ for a period of one year after the date you left your state employment, if the appearance or communication is for the purpose of influencing administrative, legislative or other specified action (including contracts). The one-year ban would not prohibit you from appearing before the DOJ during this one-year period if your appearance is for the purpose of administering or fulfilling the terms of an existing contract. The one-year ban would not prohibit you from appearing before, or communicating with, state administrative agencies other than the DOJ on behalf of Eclipse Solutions.

FACTS

On December 30, 2002, you retired from your position as the administrator of the child support program within the Department of Justice ("DOJ"). You were employed as the administrator of this program during the last 10 years of your state service. Your position is designated in the DOJ's conflict-of-interest code.

Eclipse Solutions is a local consulting firm that is involved in a major information technology project undertaken by the State of California in connection with child support enforcement and collection (i.e., CSAP). CSAP is primarily conducted under the direction of the Franchise Tax Board, although the Department of Child Support Services, Department of Motor Vehicles, Department of Vital Statistics, the Board of Equalization and other state administrative agencies are also involved in the program. The DOJ is not involved. Eclipse Solutions is interested in obtaining your services to assist them in their involvement with this program.

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. (Sections 87401 and 87402.) The second restriction is a one-year ban on making any appearance for compensation before your former agency, or officer or employee thereof, for the purpose of influencing any administrative, legislative or other specified action (including contracts). (Section 87406.)⁴

⁴ In addition, section 87407 prohibits a state administrative official from making, participating in making, or using his or her official position to influence persons with whom he or she is negotiating employment, or has any arrangement concerning employment. (Section 87407; regulation 18747.)

Permanent Ban

Sections 87401 and 87402 (collectively, the “permanent ban”) prohibit a former state administrative official from advising or representing any person, other than the State of California, for compensation in any judicial, quasi-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, 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, under section 87402 a former state administrative official shall not, for compensation, “aid, advise, counsel, consult or assist in representing any other person (except the State of California) in any proceeding in which the official would be prohibited from appearing under Section 87401.” Significantly, unlike the one-year ban, the permanent ban is not restricted to proceedings before a former official’s prior state administrative agency employer. As an administrator designated under the DOJ’s conflict of interest code you are a state administrative official and are subject to the permanent ban. (Section 87400(b).)

Participation

The permanent ban is a lifetime ban and applies to any judicial, quasi-judicial or other proceeding in which you participated while a state administrative official at the DOJ. It includes a proceeding in which you participate, but leave state employ before the proceeding concludes. (*Costa* Advice Letter, No. A-98-003.)

An official is considered to have “participated” in a proceeding if the official was personally and substantially involved in the proceeding. (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).) Your letter indicates that you were the administrator of the child support program for the DOJ. In this regard, it is

likely that there were employees under your supervisory authority.⁵ If so, you are deemed to have participated personally and substantially in the proceedings in which they were involved. Thus, in addition to the proceedings in which you were personally involved, these also would be “proceedings” subject to the permanent ban.

New Proceeding

The permanent ban does not, however, apply to “new” proceedings, including 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, No. I-99-104; *Anderson* Advice Letter, No. A-98-159.) In addition, 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.)

You should consider the above discussion in order to identify the DOJ proceedings that are subject to the permanent ban. Since this is a factual determination for you to make, we are unable to advise you, other than in the general terms above, as to whether the consulting services you may perform for Eclipse Solutions with respect to CSAP would involve you in proceedings in which you previously participated as a designated employee of the DOJ.

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 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).) Thus, as a former employee of the DOJ who occupied a position designated under the DOJ’s conflict of interest code, you are covered by the one-year ban.

⁵ Since 1985, Commission staff has consistently advised that a former state administrative agency official is deemed to have personally and substantially participated in all proceedings of his former agency, if those proceedings were in his or her chain of command during the official’s tenure at the agency. (*Sanford* Advice Letter, No. A-85-182; *Brown* Advice Letter, No. A-91-033.) The phrase “supervisory authority” was subsequently codified in regulation 18741.1, with clarification that the regulation was not meant to address situations where an official’s acts are merely ministerial. In *In re Lucas* (2000) 14 FPPC Ops. 15, the Commission concluded that an official’s general administrative oversight of a program carried out by those subordinate to the official on an agency’s organizational chart, was insufficient to rise to the level of “personal and substantial” involvement required by the Act. (Also see *Ericson* Advice Letter, No. I-02-198.) You should consider whether the *Lucas* Opinion is applicable to your facts.

Application to the DOJ

Under the one-year ban, you may not, as a consultant employed by Eclipse Solutions, appear before or communicate with the DOJ, if the communication or appearance is made for the purpose of influencing any legislative or administrative action of the DOJ, or influencing 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(d)(1); 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(a).)

Application to Other State Administrative Agencies

The one-year ban would not prohibit you from providing consulting services that involve you in appearing before or communicating with other state administrative agencies, unless the agency is subject to the budgetary authority of the DOJ. You identify Eclipse Solutions as consulting with the Franchise Tax Board, the Department of Child Support Services, and the certain other agencies that are involved in the CSAP program. Since you were not previously employed by these agencies and you have provided no facts indicating that these agencies are subject to the budgetary authority of the DOJ, the one-year ban does not prohibit you from providing consulting services to them on behalf of Eclipse Solutions.

“Existing Contract” Exception

An appearance or communication before a former state administrative agency employer, made as part of “[s]ervices 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] prohibitions... 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; *Hamilton* Advice Letter, No. I-99-159.)

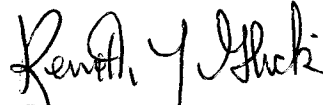
You indicate that Eclipse Solutions does not presently have a consulting contract with the DOJ with respect to the CSAP program. However, should Eclipse Solutions, without your participation, negotiate a contract with the DOJ to provide CSAP-related consulting services,⁶ regulation 18746.1(b)(5)(A) would permit you to appear before, and communicate with, the DOJ to administer, implement, or fulfill the requirements of such a contract during the period of the one-year ban. However, communications between you and the DOJ that would not be made to administer, implement, or fulfill an existing contract between the DOJ and your future employer, but are made for the purpose of influencing the legislative or administrative actions of the DOJ, including the award of a contract to Eclipse Solutions or others, would be prohibited under the one-year ban.

⁶ Once a new contract has been brought into existence, it becomes an “existing contract” for purposes of regulation 18746.1(b)(5)(A). (*Hamilton* Advice Letter, No. I-99-159.)

For your further information, we are enclosing a copy of the Commission's Fact Sheet entitled, "*Leaving Your State Job? Post-Employment Restrictions May Affect You*". 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

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