



## FAIR POLITICAL PRACTICES COMMISSION

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March 19, 2009

David Nelson  
P.O. Box 2020  
Grass Valley, CA 95945

Re: Your Request for Advice  
**Our File No. A-09-051**

Dear Mr. Nelson:

This letter responds to your request for advice regarding the post-governmental employment restrictions of the Political Reform Act (the "Act").<sup>1</sup> Please note that our advice is based solely on the Act. We therefore offer no opinion on the application, if any, of other post-government employment laws such as Public Contract Code, Section 10411. Additionally, this letter should not be construed as advice on any conduct that may have already taken place. This letter is based on the facts presented. The Fair Political Practices Commission ("Commission") does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71; Govt. Code section 83114.)

### QUESTIONS

Within one year after leaving your state position at the State Department of Housing and Community Development (HCD) may you:

- Volunteer your services to assist Nevada County's application for HCD funding under HCD's Community Development Block Grants ("CDBG") program;
- Assist applicants for HCD loans under existing HCD grants in which you had recused yourself and had no involvement in making funding determinations?

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<sup>1</sup> 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.

## CONCLUSIONS

- You may appear on behalf of and represent Nevada County or others before HCD on a volunteer basis. Volunteer services provided by former state employees are exempt from the Act's one-year prohibition and the permanent ban.
- The one-year prohibition bars you from representing Nevada County or others by making any formal or informal appearance, or by making any oral or written communication, before HCD for one year after you have left state service if the appearance or communications are made for the purpose of influencing administrative action, or influencing an action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods. Your proposed work of submitting loan applications and communicating with HCD staff for the purpose of influencing HCD to award loans to your clients would violate the one-year ban. You may, however, assist your clients in drafting and preparing their loan applications so long as you are not identified in connection with the clients' efforts to influence HCD's decision.
- The permanent ban may also affect your proposed consulting work to the extent that you would be representing your clients before HCD by making any formal or informal appearance, or making any oral or written communication with the intent to influence any judicial, quasi-judicial or other proceeding in which you participated (as defined below) while employed by the state.

## FACTS

You retired from your state job at HCD on September 2, 2008. At HCD you worked on CDBG grants. In this capacity, you participated in funding decisions to award grants to certain eligible cities and counties. However, you were required to recuse yourself from making grant funding decisions for Nevada County and jurisdictions located within Nevada County and you have, in fact, had no involvement in the funding determinations of these grants.

Since retiring from state service, you have been operating a consulting business, David Nelson Consulting. Your business has entered into a contract to implement portions of two existing CDBG grants awarded to Nevada County. You ask whether you may comply with your contractual obligations to assist Nevada County in implementing existing HCD grants. Your work would consist of coordinating and packaging individual loan applications, submitting them to HCD and communicating with HCD staff regarding these submissions. You would do so by using a CDBG checklist as a guide. You describe your work under this contract as ministerial.

Since leaving state service, you have volunteered your services for Nevada County in various capacities, including help on a potential HCD grant application which

has not yet been submitted. You ask whether volunteering your services is permitted by the Act.

We assume for purposes of our analysis you were a designated employee of HCD, and therefore required to file a Statement of Economic Interests or you were in a position at HCD in which you made or participated in governmental decisions affecting financial interests.

## ANALYSIS

*Revolving Door Restrictions, Generally:* Officials who have left state service are subject to two types of restrictions under the Act. The first is a one-year prohibition on making any appearance before the former agency for the purpose of influencing administrative or legislative action or action involving other proceedings such as contracts. The second is a permanent prohibition on influencing any judicial or other proceeding in which the official participated while in state service.

### One-Year Ban

Section 87406(d)(1) of the Act provides that:

“No designated employee of a state administrative agency . . . for 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.” (Emphasis added.)

“Administrative action” is defined in Section 82002 as the proposal, drafting, development, consideration, amendment, enactment, or defeat by any state agency of any rule, regulation or other action in any rate-making proceeding or any quasi-legislative proceeding, including any proceeding regarding adoption of regulations governed by Government Code, Section 11340 et seq.<sup>2</sup>

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<sup>2</sup> “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. (Section 82037.)

Any communications such as telephone calls or meetings with agency staff that are intended to influence 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, are prohibited under Section 87406. However, communications to administrative agencies, which are not for the purpose of influencing administrative or legislative action or these other types of proceedings, are not restricted by Section 87406.

There are exceptions to these prohibitions:

- As a volunteer, you may not receive compensation, other than payments for necessary travel, meals, and accommodations received directly in connection with voluntary services. (Regulation 18746.1(b)(3).)
- You may appear for purposes other than influencing the actions of HCD, such as to attend training. (Regulation 18746.2 (b)(2).)
- Services performed to administer, implement, or fulfill the requirements of an existing permit, license, grant, contract, or sale agreement may be excluded from the prohibitions of this regulation, provided the services do not involve the issuance, amendment, awarding, or revocation of any of these actions or proceedings. However, the prohibitions of Sections 87401 and 87402 may apply.
- When an agency issues permits subject to clear objective criteria as set forth in a statute, ordinance, or regulation, the action taken is ministerial in nature and, therefore, is not administrative action. (*Miller* Advice Letter, No. I-93-098 and *Andrus* Advice Letter, No. A-85-035.) In addition, pursuant to regulation 18746.1(b)(5), where there is no discretion 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 does not apply.
- The Commission has previously advised that a former agency official could draft proposals on a client's behalf to be submitted to the agency as long as the former employee was not identified in connection with the client's efforts to “influence administrative action.” (*Harrison* Advice Letter, No. A-92-289); *Miller* Advice Letter, No. I-93-098; and *Kingma-Rymek* Advice Letter, No. A-95-141.) Reasonable precautions should be taken to ensure that your involvement in an application not be disclosed.

As to your first question, you may provide volunteer services if any payments you receive are limited to those that are necessary for travel, meals, and accommodations received directly in connection with your voluntary services.

With respect to your second question, the services you intend to provide for compensation include coordination and packaging of loan applications, submitting the applications to HCD and communicating with HCD staff regarding the submissions. These activities fall squarely within the prohibitions of the one-year ban in that you would be representing Nevada County by making appearances and oral and written communications before the administrative agency for which you worked and these appearances or communications (“back and forth discussions”) would be made for the purpose of influencing HCD’s decision to grant a loan. A decision to grant a loan is “an 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 only applicable exception would require that you limit your services to drafting and assisting in preparing proposals on Nevada County’s behalf if you ensure that you are not identified in connection with the county’s efforts to “influence administrative action.” (*Harrison* Advice Letter, No. A-92-289); *Miller* Advice Letter, No. I-93-098; and *Kingma-Rymek* Advice Letter, No. A-95-141.) As stated above, reasonable precautions should be taken to ensure that your involvement in an application not be disclosed. Communicating with the state and engaging in “back and forth” discussions that you have described are not permitted under the one-year ban.

While you describe your role in assisting the county as “ministerial,” the “ministerial act” exemption focuses not on your acts but those of the agency. The question under this exception is whether *the agency’s decision* is based on clear objective criteria as set forth in a statute, ordinance, or regulation, so as to be ministerial in nature and, therefore, not administrative action. This exception under Regulation 18746.1(b)(5) contemplates that the agency exercises no discretion in its decision to grant or deny the loan application. The use of a “checklist” as a guide for preparing loan applications has no bearing on the issue of whether HCD exercises discretion in its decisionmaking. We conclude that HCD exercises discretion when it decides whether or not to grant a loan.

Accordingly, for a period of one year after September 2, 2008, you may not submit loan applications to HCD or communicate with HCD staff regarding these submissions because your appearances and communications would be made for the purpose of influencing an action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract. You may, however, engage in “behind the scenes” assistance where your identity is not disclosed as a participant in preparing the loan submissions.

### **Permanent Ban**

The Act also contains a permanent prohibition on former state officials’ involvement in certain proceedings in which they participated while working for the

state. Sections 87401 and 87402 provide:

“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.” (Section 87401.)

“No former state administrative official, after the termination of his or her employment or term of office shall 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.” (Section 87402.)

HCD is a state administrative agency. (Section 87400(a).) Section 87400(b) defines a “state administrative official” 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. As a designated employee of HCD, you were considered a state administrative official.

However, this restriction is limited to judicial, quasi-judicial, or other proceedings in which you participated. Section 87400 provides:

“(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, including but not limited to any proceeding governed by Chapter 5 (commencing with Section 11500) of Division 3 of Title 2 of the Government Code.

“(d) ‘Participated’ means to have taken part personally and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation or use of confidential information as an officer or employee, but

excluding approval, disapproval or rendering of legal advisory opinions to departmental or agency staff which do not involve a specific party or parties.”

Under Section 87400(c) set forth above, a “proceeding” includes any particular matter involving a specific party or parties in a state administrative agency. The permanent ban does not apply to a new proceeding even in cases where the new proceeding is related to or grows out of a prior proceeding in which the official had participated. A new proceeding not subject to the permanent ban typically involves different parties, a different subject matter, or different factual issues from those considered in previous proceedings. (*Rist* Advice Letter, No. A-04-187; see also *Donovan* Advice Letter, No. I-03-119.)

The statute prohibits you from acting as agent or attorney for, or otherwise representing, any other person for compensation in proceedings in which you *participated*, as defined above. In addition, you may not aid, advise, counsel, consult or assist in representing any other person.

The following exceptions apply to the permanent ban:

- You may appear on behalf of another person on a volunteer basis. As a volunteer, you may not receive compensation, other than payments for necessary travel, meals, and accommodations received directly in connection with voluntary services. (Regulation 18746.1(b)(3.))
- You may appear for purposes other than influencing the actions of HCD, such as to attend training. (Regulation 18746.2 (b)(2).)
- If proceedings to determine whether to grant a loan application are considered separate proceedings from those in which you participated when employed by the state, the permanent ban would not apply. 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.)

You indicate that the loan applications you will be working on will not involve any funding determinations in which you participated while employed by HCD. You recused yourself from making any funding determinations involving Nevada County and you had “no involvement” in any proceedings relating to these determinations. Under these circumstances, we conclude that you did not “participate” (within the meaning of Section 87400(c)) in any proceedings in which you propose to represent HCD. Accordingly, while the one-year prohibition limits certain of your proposed consulting activities, as discussed above, the permanent ban will not apply to any of these activities.

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

Sincerely,

Scott Hallabrin  
General Counsel

A handwritten signature in black ink, appearing to read "Valentina Joyce", with a long horizontal flourish extending to the right.

By: Valentina Joyce  
Counsel, Legal Division

VJ:jgl