

## BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

In the Matter of:	)	
	)	
Opinion Requested by:	)	No. 76-074
Richard J. Moore	)	March 1, 1977
County Counsel, County of	)	
Alameda	)	

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BY THE COMMISSION: We have been asked the following questions by Richard J. Moore, County Counsel, County of Alameda:

Hubert Bryant, a retired county employee who receives a pension from the county, serves on the nine member county board of retirement.<sup>1/</sup> Members of the board of retirement, in administering the fund of the retirement system, vote on such matters as the contribution rate, into the system for employees, the interest assumption rate,<sup>2/</sup> and appropriate uses for any surplus created by adjustment of the interest assumption rate.

The interest assumption rate, which is based on an actuarial valuation, is a rate used for the purpose of determining whether all or a portion of the earned income of the retirement fund should be credited to employer and employee contributions. The difference between the amount credited to the employer and employee accounts and the amount actually earned is used for reserves, contingencies and losses on investments. Once these needs are satisfied, any additional earned income not allocated becomes surplus. Hence, by varying the interest assumption rate, additional surplus can be created which in turn can be used by the board of retirement to provide additional pension benefits to retirees, including, for example, health insurance benefits, supplementary cost of living benefits and death benefits.

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<sup>1/</sup> Mr. Bryant serves pursuant to a statutory requirement that one member of the board shall be a retired member. Gov. Code Section 31520.1. The remainder of the board is comprised of three current county employee members, four public members and the county treasurer. Id.

<sup>2/</sup> Although the retirement board technically makes only "recommendations" with respect to the interest assumption rate, its recommendations are in fact binding on the Board of Supervisors. Gov. Code Section 31454.

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On the basis of these facts, Mr. Moore asks whether the retired member of the board of retirement is prohibited by the Political Reform Act from voting on:

- (1) decisions concerning the interest assumption rate; and
- (2) decisions concerning how any surplus created by adjustment of the interest assumption rate is to be used.

#### CONCLUSION

The retired member of the board of retirement is not precluded from voting on decisions regarding either the interest assumption rate or the appropriate uses for any surplus generated by a change in the rate.

#### ANALYSIS

Government Code Section 87100<sup>3/</sup> contains the basic conflict of interest prohibition and provides:

No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.

As a member of the county board of retirement, a local government agency within the meaning of Section 82041, the retired member is a public official.<sup>4/</sup> Moreover, it is clear that he makes, participates in making and attempts to use his official position to influence governmental decisions by reason of his activities relative to board action on the interest assumption rate and the uses of surplus. Accordingly, the sole issue for determination is whether the retired member has a "financial interest" in these governmental decisions.

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<sup>3/</sup> All statutory references are to the Government Code unless otherwise noted.

<sup>4/</sup> Section 82042 states that a "public official" means "every member, officer, employee or consultant of a state or local government agency."

Section 87103 defines "financial interest" and provides:

An official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on:

(a) Any business entity in which the public official has a direct or indirect investment worth more than one thousand dollars (\$1,000);

(b) Any real property in which the public official has a direct or indirect interest worth more than one thousand dollars (\$1,000);

(c) Any source of income, other than loans by a commercial lending institution in the regular course of business, aggregating two hundred fifty dollars (\$250) or more in value received by or promised to the public official within twelve months prior to the time when the decision is made; or

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

For purposes of this section, indirect investment or interest means any investment or interest owned by the spouse or dependent child of a public official, by an agent on behalf of a public official, by any business entity controlled by the public official or by a trust in which he has a substantial interest. A business entity is controlled by a public official if the public official, his agents, spouse and dependent children hold more than fifty percent of the ownership interest in the entity. A public official has a substantial interest in a trust when the official, his spouse and dependent children have a present or future interest worth more than one thousand dollars (\$1,000).

It is clear that subsections (a), (b) and (d) of Section 87103 are not implicated in this opinion request by virtue of the retired employee's receipt of a pension from the county retirement system. If, however, the pension is

"income" within the meaning of Section 82030(b), the retirement system would be a source of income within the meaning of Section 87103(c) and we would have to analyze whether it is reasonably foreseeable that the decisions of the board of retirement will have a material financial effect, distinguishable from its effect on the public generally, on the retirement system. On the other hand, if the pension is excluded from the definition of income by Section 82030(b)(2), which removes "salary and reimbursement for expenses or per diem received from a ... local government agency" from income, the pension will not take the retirement system a source of income to the retired employee and, hence, will not create the type of "financial interest" that can preclude the retired employee from participating in the subject decisions.

We turn, therefore, to consideration of the applicability of Section 82030(b)(2) to a pension from a county retirement system. When an employee agrees to work for the county, he is entitled to certain benefits which comprise his compensation. He receives, for example, a monthly salary, vacation and sick leave and retirement benefits which, by law, must be provided as an additional element of compensation.<sup>5/</sup> Thus, as the California Supreme Court has observed, retirement benefits, such as a pension, "do not represent the beneficent (sic) gratuities of the employer; they are, rather, part of the consideration earned by the employee." Waite v. Waite, 6 Cal. 3d 451, 459 (1972). In other words, "the pension payment serves as a remuneration for services rendered by the employee ...." Id., at 471. See also Sweesy v. Los Angeles County Peace Officers' Retirement Board, 17 Cal. 2d 356, 360 (1941). A pension, therefore, is essentially a type of deferred salary whereby an employee agrees to receive a smaller payment while working in exchange for the security of receiving the remaining portion of his compensation after he retires.

Since a pension is, in essence, a deferred salary payment, we conclude that it is included in "salary," as that term is used in Section 82030(b)(2). We note, moreover, that the pension in the present case is from a local government agency. The retirement fund is simply the accounting mechanism used by the county to accumulate and disburse the pension benefits.<sup>6/</sup> Accordingly, we conclude that the pension is "salary ... from ... a local government" agency and is, therefore, excluded from the definition of income by Section 82030(b)(2).

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<sup>5/</sup> Section 31451 provides that part of the county's public obligation to county employees is to make provision for retirement benefits as "additional elements of compensation ...."

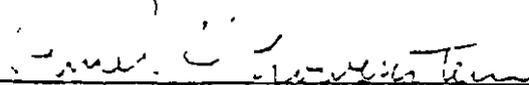
<sup>6/</sup> Section 31471 defines pension to mean payments made from funds controlled by the county board of supervisors.

Based on the foregoing analysis, it is clear that the pension received by the retired employee from the county retirement system does not constitute a "financial interest" within the meaning of Section 87103. Consequently, the retired employee is not prohibited by Section 87100 from participating in board of retirement decisions concerning the interest assumption rate or appropriate uses for surplus.<sup>1/</sup>

We recognize that this conclusion authorizes participation by the retired employee board member in some decisions which involve a potential "conflict of interest" in the sense that the decisions can have an impact on the amount of his pension benefits. This potential "conflict," however, is not qualitatively different than the conflict of interest faced by other board members who are currently county employees. Current county employee board members participate in decisions which will affect the amount of their contributions to the retirement plan, and thus also affect the amount of their income. They can do so because Section 82030(b)(2) clearly eliminates their salary as a disqualifying financial interest.

In concluding that the retired employee board member also can participate in decisions which may affect his income because a public pension falls within the ambit of Section 82030(b)(2), we avoid the anomaly of treating the retired board member differently than the other board members when he is, in reality, similarly situated. We think this is consistent with the provisions and the intent of the Political Reform Act.

Approved by the Commission on March 1, 1977.  
Concurring: Carpenter, Lowenstein and Quinn. Commissioner Lapan was absent.

  
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Daniel F. Lowenstein  
Chairman

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<sup>1/</sup> We observe that our opinion herein is limited to the requirements of the Political Reform Act and we intimate no opinion regarding whether the retired member of the board of retirement has a common law conflict of interest.