



California Fair Political Practices Commission

December 6, 1985

Lawrence M. Schoenke
Deputy County Counsel
Kings County
Government Center
Hanford, CA 93230

Re: Your Request for Advice
Our File No. A-85-239

Dear Mr. Schoenke:

This is in response to your letter dated November 13, 1985 requesting advice on behalf of Mr. Richard Neill, a member of the Board of Trustees, Hanford Joint Union High School District of Kings and Tulare Counties.

FACTS

Mr. Neill is employed as a licensed contractor with Octagon Associates; he is not an officer or director of Octagon Associates, and he does not hold a position of management with that firm. As part of his duties, Mr. Neill is required to inspect construction projects and determine whether the project conforms with the architectural plans and specifications.

The Board of Trustees is considering the employment of an architectural firm as a consultant on a retainer basis. The firm selected would probably also be used on specific construction contracts to oversee and manage the work of the hired building contractors. One of the firms that will be considered is Octagon Associates. If Octagon Associates is selected, Mr. Neill would not personally handle any of the contract administration matters involving the District.

QUESTIONS

1. Whether Mr. Neill must disqualify himself from voting on any architectural consultant contract between Octagon Associates and the District?

2. Whether Mr. Neill must disqualify himself from participating in any decision relating to services of a building contractor who is being supervised by Octagon Associates on behalf of the District?

ANALYSIS

The Political Reform Act of 1974^{1/} prohibits a public official from making, participating in making or in any way attempting to use his or her official position to influence a governmental decision in which he or she knows or has reason to know that he or she has a financial interest. (Section 87100.)

An official has a financial interest in a decision 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 one thousand dollars (\$1,000) or more.

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

(c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred fifty dollars (\$250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made.

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

(e) Any donor of, or any intermediary or agent for a donor of, a gift or gifts aggregating two hundred fifty dollars (\$250) or more in value provided

1/ Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated.

to, received by, or promised to the public official within 12 months prior to the time when the decision is made.

Section 87103.

Because Octagon Associates presumably is a source of income of more than \$250 per year to Mr. Neill, Mr. Neill has an economic interest in Octagon Associates. Section 87103(c). In addition, he has an economic interest in Octagon Associates as a result of being an employee. Section 87103(d). Accordingly, Mr. Neill must disqualify himself from participating in any decision which will have a reasonably foreseeable material financial effect on Octagon Associates.

Regulations adopted by the Commission specify the situations where disqualification is always required. 2 Cal. Adm. Code Section 18702.1 requires disqualification when "any person (including a business entity) which has been a source of income (including gifts) to the official of \$250 or more in the preceding 12 months appears before the official in connection with the decision." (Emphasis added.) Subsection (b) of the regulation states that a business entity "appears before an official in connection with a decision" when that business entity "is a named party in the proceeding concerning the decision before the official or the body on which the official serves."

When Octagon Associates submits a bid in response to the District's solicitation for an architectural consultant it becomes a "party" to the bid selection proceeding. Therefore, in its attempt to win the contract with the District, Octagon Associates is appearing before the body on which Mr. Neill is a member.

This situation is similar to that in Witt v. Morrow (1977), 70 Cal. App. 3d 817, where the court held that a city councilman was prohibited from participating in a decision that foreseeably would enrich his employer. The court concluded:

It is not just actual improprieties which the law seeks to forestall but also the appearance of possible improprieties. Any employee, in the private or public sector, wishes to keep his job and maintain good relations with his employer. A person who must make decisions which may affect his employer's purse is in

a situation where he may not give full consideration to the merits of the decision.

70 Cal. App. 3d at 823.

Accordingly, Mr. Neill must disqualify himself from participating in the decision to select an architectural firm.^{2/}

If Octagon Associates is awarded the contract with the District for contract administration services, potential conflicts of interest may result under certain situations. Assume for purposes of discussion, that Mr. Neill performs work, as an employee of Octagon Associates, for the District. Mr. Neill would be disqualified from participating in any decision that would affect the contractual relationship between the District and Octagon Associates because "there is a nexus between the governmental decision and the purpose for which the official receives income." 2 Cal. Adm. Code Section 18702(b)(3)(B).

If, as you indicated, Mr. Neill does not perform any of the contract administration services for the District, Mr. Neill would still be prohibited from participating in any decision when Octagon Associates is a party to the proceeding under 2 Cal. Adm. Code Section 18702.1, supra. This would include any decision to extend, rescind or modify the contract between the District and Octagon Associates.

However, decisions that effect only the contractor which Octagon Associates was supervising probably would not require disqualification since it is not likely that such a decision would also affect the contractual relationship between the District and Octagon Associates. However, if cumulative effects could be foreseen which would result in an effect upon Octagon, disqualification could be required.

CONCLUSIONS

1. Mr. Neill must disqualify himself from participating in the selection of an architectural firm if Octagon Associates is one of the firms being considered.

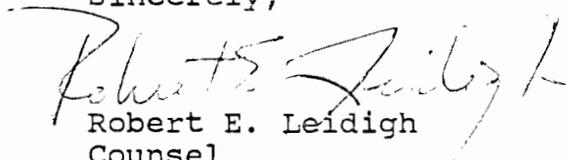
^{2/} We have not included any analysis of the possible application of Section 1090. That section is not part of the Political Reform Act. We suggest that you consult with the Attorney General in that regard. See also, Ch. 816, Stats. 1985.

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2. Mr. Neill probably may participate in some decisions affecting the contractors supervised by Octagon Associates.

This discussion only concerns the conflict of interest issues raised by the Political Reform Act. This situation may also raise issues under Section 1090 as well as the conflict of interest provisions contained in the Education Code. As we are not authorized to give advice on those laws you may wish to contact the Attorney General's Office for assistance.

Sincerely,



Robert E. Leidigh
Counsel
Legal Division

REL:JG:plh

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Nov 15 2 05 PM '85

November 13, 1985

Robert E. Leidigh, Esq.
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Fair Political Practices Commission
428 J Street, Ste. 800
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Re: Request for Opinion
on Conflict of Interest

Dear Mr. Leidigh:

As a result of our telephone conversation of November 8, 1985, this office is requesting an opinion on possible conflicts of interest of a school board member under the Political Reform Act (Government Code Section 81000, et seq.).

The school board member involved is Mr. Richard Neill. Mr. Neill's home address is 2003 Leoni Drive, Hanford, California 93230, (209) 584-6203, and his business address is Octagon Associates, 119 S. Locust, Visalia, California 93277, (209) 733-4600. He is currently a duly elected member of the Board of Trustees, Hanford Joint Union High School District of Kings and Tulare Counties. His term expires in November 1987.

Mr. Neill is employed as an licensed contractor with Octagon Associates. He is not a manager, officer, or director of Octagon Associates, but is a salaried employee. He has the primary duty of construction administration on projects on which Octagon Associates are the supervising architects. There is one other contractor who works in that division of the company along with Mr. Neill. As part of his duties, Mr. Neill is required to inspect construction projects, and determine whether the project conforms with the architectural plans and specifications.

The Governing Board of Trustees on which Mr. Neill serves is considering the employment of an architectural firm as consultant on a retainer basis. The firm would probably also be used on specific construction contracts to oversee and manage the work of hired building contractors. One of the firms that will be considered is Octagon Associates.

Robert E. Leidigh, Esq.
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Mr. Neill has authorized us to ask the following questions:

(1) Does the Political Reform Act provisions on conflict of interest (Government Code Sections 87100-87103.5) prohibit Mr. Neill from voting on any architectural consultant contract between Octagon Associates and the high school district?

(2) Must he abstain from voting on any decision relating to services of a building contractor who is being supervised by Octagon Associates, on behalf of the District?

In relation to Question 2, quite often the contract administrators inspect and report to the Board of Trustees on the progress of the construction, and on the building contractor's compliance with the contract specifications. Based on this information, the Board of Trustees decides, among other things, to pay the progress payments to a building contractor or to declare a breach of the construction contract. Mr. Neill indicates that the other contractor in his division at Octagon would be handling all of the contract administration matters for the District. He does not supervise the other contractor in his division, and he has no power to overrule that person as far as drafting or writing of the report from Octagon Associates to the high school board. However, he wishes to fulfill his obligations as an elected board member to inspect the projects himself, and either agree or disagree with the report of Octagon Associates and to vote accordingly at school board meetings.

Your attention to this matter is greatly appreciated.

Very truly yours,

DENIS A. EYMIL
County Counsel

By 
'LAWRENCE M. SCHOENKE
Deputy County Counsel

LMS/gd

cc: Trustees:
John Boogaard
Brennan Brown
Wayne Wisecarver
Ginger Newman
Richard Neill
John Carmean
Terry Johnston
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Leeds Lacy, Superintendent