



California Fair Political Practices Commission

January 15, 1987

Donald L. Clark
Santa Clara County Counsel
County Government Center, East Wing
70 West Hedding Street
San Jose, CA 95110

Re: Your Request for Advice
Our File No. A-86-271

Dear Mr. Clark:

You have requested advice on behalf of the County of Santa Clara concerning the conflict of interest provisions of the Political Reform Act (the "Act").^{1/}

QUESTION

Should the county's conflict of interest code be amended to include the position of a court-appointed compliance officer who is supervising operations in county jail facilities?

CONCLUSION

The compliance officer is a public official subject to the conflict of interest provisions of the Act; however, his position should be covered by the superior court's conflict of interest code.

FACTS

Facts Not In Dispute^{2/}

Mr. Thomas Lonergan has been appointed by the Santa Clara County Superior Court as a compliance officer in the case of

^{1/} Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Administrative Code Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Administrative Code.

^{2/} Out of an abundance of caution and because the proceedings involving the compliance officer have been labeled "contentious," I have taken the unusual step of inviting

Donald L. Clark
January 15, 1987
Page 2

Branson v. Winters (Case No. 78807). The case involves conditions at the men's county jail facilities. Mr. Lonergan's appointment as compliance officer was made pursuant to a settlement agreement in the case. The case was originally before a local judge (Judge Premo), but was subsequently transferred to a retired judge sitting by assignment (Judge Avakian) after all of the Santa Clara County judges recused themselves.^{3/}

Various court orders have been issued regarding the role of the compliance officer in implementing the settlement agreement. His role has been substantial, as have his fees, which are paid by the county.

Facts In Dispute

The facts as to the precise level of decision-making authority given to Mr. Lonergan appear to be in dispute. You have pointed to certain court orders which appear, on their face, to grant to Mr. Lonergan broad and direct decision-making authority over certain aspects of the county's penal operations. Judge Avakian and Mr. Lonergan have stressed the actual role of the compliance officer and the recent modification of the court's orders. These modifications would substantially curtail any direct decision-making role by Mr. Lonergan. Judge Avakian contends that Mr. Lonergan's role in the future will be limited to making recommendations to the court. All operative decisions will be made by Judge Avakian, not Mr. Lonergan.

ANALYSIS

The Political Reform Act (the "Act") seeks to prevent public officials from acting in a self-interested manner. (Sections 81001(b), 87100, and 87103.) The Act's purposes include the following:

(footnote 2 continued)

comment and seeking information from the court and from the compliance officer, in addition to relying on the materials you have supplied. This was done with your knowledge and your concurrence. While the viewpoints of the parties differ, a number of the essential facts are not in dispute.

^{3/} My correspondence with the court has been with Judge Avakian.

Donald L. Clark
January 15, 1987
Page 3

Assets and income of public officials which may be materially affected by their official actions should be disclosed and in appropriate circumstances the officials should be disqualified from acting in order that conflicts of interest may be avoided.

Section 81002(c).

Thus, the Act requires the filing of statements which disclose economic interests of public officials that may be affected by the governmental decisions which the officials make. (See, Sections 87200, et seq. and 87300, et seq.)

For those officials who are not enumerated in Section 87200, the requirements for filing financial disclosure statements are contained in a conflict of interest code adopted by the official's agency. (Section 87302.) Recent amendments to the Act (Chap. 727, Stats. 1984) deleted a prior exemption for officials of the judicial branch of government. Consequently, in addition to judges, who are specified in Section 87200, certain other officials of the judicial branch of government are now required to file disclosure statements. Unlike judges and court commissioners these other officials of the judicial branch may be required, in appropriate circumstances, to disqualify themselves. This change in the law has prompted your request for advice on behalf of the county.

If it is determined that the compliance officer is a "public official" within the meaning of the Act, he may well be required to make financial disclosures and he will be subject to the Act's disqualification provisions. The follow-up issues are what disclosure is required, and under which conflict of interest code: the county's or the court's.

We believe that Mr. Lonergan is a "public official" within the meaning of the Act. (Sections 82041, 82048 and 82049.) He is either making or participating in making governmental decisions within the meaning of Regulation 18700. Whether viewed as county decisions or court decisions, the decisions are clearly those of a governmental agency. Consequently, Mr. Lonergan is subject to the Act's conflict of interest provisions. The question remains what disclosure, if any, is required and which conflict of interest code should cover his position if disclosure is to be required.

Under the facts asserted by you, Mr. Lonergan functions to a large extent as an administrative official of the County of Santa Clara, albeit employed pursuant to court order. Under

such circumstances, coverage by the county's conflict of interest code would seem to be appropriate.^{4/} On the other hand, under the facts asserted by the court, Mr. Lonergan's activities are now to be confined to making recommendations to the court. Under these circumstances, coverage by the court's conflict of interest code would seem more appropriate.^{5/}

Normally, the Commission will accept the facts provided by the requester and will issue its advice based upon those facts. The immunity provided by the advice is limited to the facts supplied by the requester. (Section 83114(b).) However, here the facts are to be determined by the wording of the court's order, which sets out Mr. Lonergan's role. Consequently, we feel that it is appropriate, under these unusual circumstances, to defer to Judge Avakian's description of Mr. Lonergan's future role since it is Judge Avakian who will define that role. Consequently, we conclude that, with the limitation of Mr. Lonergan's role to only making recommendations to the court, which must approve of any recommendations before they become operative, coverage of his position under the court's conflict of interest code is appropriate.

There remains the issue of what disclosure categories should be assigned to Mr. Lonergan's position. You have raised concern that, in the past, Mr. Lonergan has employed, at county expense, various experts and consultants. As stated above, it is our understanding that in the future, all such decisions would be ratified by the court before becoming operative.

Disclosure categories for Mr. Lonergan's position should include disclosure of investments in, business positions held and income received from any person or business entity which contracts with or has in the past two years contracted with the county to provide consulting services related to the Branson

^{4/} This is similar to the situation where an administrative official terminated by the county is reinstated by a court because of wrongful termination. That person would still be a county official and subject to its conflict of interest code.

^{5/} This is similar to a research attorney who advises the court on legal matters relative to cases pending before the court. Research attorneys "participate" in making governmental decisions. (See, Regulation 18700(c)(2), copy enclosed.) Research attorneys are now covered by the various courts' conflict of interest codes.

Donald L. Clark
January 15, 1987
Page 5

case. The same disclosure should be made for any persons or businesses of the type which would be likely to seek contracts for such work in the future. Another component of disclosure should include any of the same types of interests in (i.e., investments in or income from) persons or entities involved, or which foreseeably may seek to become involved, in providing food, transportation, or medical services for the Santa Clara County penal system. (For the requirements of a conflict of interest code, see generally Section 87302.)

The foregoing description is not exhaustive, but is offered as an example of the types of disclosure categories which appear to be appropriate given Mr. Lonergan's scope of involvement in the decision-making processes. The court is much closer to the case and is in a better position to formulate appropriate disclosure categories. (See, Section 87301.) Our agency is, of course, available for consultation and assistance in this regard. (Section 87312.) If such assistance is desired, please do not hesitate to contact me.

Should you, Judge Avakian or Mr. Lonergan have any questions regarding this letter, I may be reached at (916) 322-5901.

Sincerely,

Diane M. Griffiths
General Counsel


By: Robert E. Leidigh
Counsel, Legal Division

DMG:REL:plh
Enclosure
cc: Honorable Spurgeon Avakian
Mr. Thomas F. Lonergan

THOMAS F. LONERGAN
Compliance Officer, Branson v. Winter

Dec 11 11 13 AM '86

9900 LAKEWOOD BLVD. #101
DOWNEY, CA. 90240
(213) 861-1251

December 8, 1986

Refer 083-126-003/6342-B

Mr. Robert E. Leidigh
California Fair Political Practices Commission
428 J Street, Suite 80
Sacramento, CA. 95804
Dear Mr. Leidigh:

I appreciate the time
You were of great assistance in
ing the Fair Political Practices
access to counsel by the
questions concerning the
As you are aware the
resigning as the County
the letter from the County
advise you that I do not

from that case, with all time and expenses being pro bono since the attempt
by the County to have me suppress a critical report to the court (see
Attachment #1.) As I indicated in our earlier conversation I would like to
correct some statements in Mr. Clark's letters to you, as well as clarifying
additional issues.

First, the position of Compliance Officer is one created by the parties in the
Settlement Agreement, with any power, or authority derivative from that
document. Each and every recommendation that I have made has been
submitted first to the court for review, with both Judge Premo and Judge
Avakian evaluating each one. Both of the judges in the case have modified
and/or rejected recommendations of the Compliance Officer. The Amended
Order of Reference states specifically:

Recommendations not appealed to Court shall be incorporated

A-86-2071
See Extra file in
file cabinet for
incoming exhibits
(Attachments)

and confirmed by a written order of the Court, upon a form agreeable to the parties. (Amended Order of reference p.3, *4a).

The original Order of Reference was superseded by the Amended Order as quoted above. It is clear from the above that the Compliance Officer was not seen as possessing authority to issue orders, but only to make recommendations to the court.

In Mr. Clark's letter of 8/26/86 it is stated that "The Court has given the Compliance Officer authority to make decisions regarding proper medical treatment and housing for persons in the Main Jail Medical II Unit, to which the county has also objected." The facts are as follows:

- (1) Following intensive investigation triggered by the suicide of a male inmate in the Santa Clara County Main Jail, the Compliance Officer filed ex parte motions for enforcement and orders to show cause (Attachment 2). The Court then issued an order on July 6, 1984 which required the County to comply with applicable portions of the California Administrative Code pursuant to the Short-Doyle Act, Lanterman-Petris-Short Act, and California Minimum Jail standards (see Attachment 3). In point of fact that order at page 2, line 9, specifically prohibits the types of housing that the Compliance Officer in 1986 recommended the county cease doing. Until crowding and inmate violence became such pronounced issues in the jail system the Compliance Officer had not enforced the sections of the 1984 Order in a good faith attempt to allow the county 2 years to come into compliance with applicable state law. The housing in the Annex that the county contends was stopped by Compliance Officer Recommendation 86-6 in 1986 was in fact ordered stopped in 1984 (see Attachment 4.) In addition, at no time has the court conferred upon the Compliance Officer the authority to make medical diagnosis or decisions. The recommendation to cease housing in violation of appropriate statutes, and court order, is far from decision making

with respect to medical care. My sole authority was, as stated, to put the County on notice that they were not complying with the 1984 Order, and that present conditions required compliance.

- (2) At page 3 of Mr. Clark's letter it is stated that "In 1984, the Compliance Officer engaged experts and made recommendations to the court that the county negotiate with a specific vendor to contract with the jail system for full food service delivery." That statement is misleading on its own, and is not supported by the facts. On April 2, 1984 the County was ordered to "...commence contract negotiations with a private sector institutional food service vendor to provide food service to all jail system facilities currently operated by the Sheriff (see Attachment 5 at page 2.) This order followed an almost continuous failure of food service to comply with basic health regulations, or the Minimum Jail standards. It was the court's decision to seek independent food service which was consistent with statewide trends in 1984 regarding private sector involvement. During this same period the court and the county also considered proposals to establish a county department of corrections in lieu of the traditional management of the entire jail system. The court subsequently stayed the order to allow the county to proceed with bidding and evaluation of vendors, and all interviews with the vendors were conducted by the county's representatives. As can be seen from the documents submitted as Attachment 6, there was a great amount of activity during the months of April, May and June as the County explored additional avenues to provide food service. Finally on July 5, 1984 the court issued an order directing the Compliance Officer file "a report evaluating current food service within the jail system as well as vendor proposals submitted to the County." (Attachment 7). The Compliance Officer then submitted a report (not Recommendations) on July 26, 1986 assessing food service delivery and various vendors. These recommendations were not the traditional ones which required 3 day or 5 day time limits, but were solely advisory in nature. The court subsequently lifted its self-imposed stay on the April 4, 1984 Order

subsequently lifted its self-imposed stay on the April 4, 1984 Order and the county entered into the contract. My report (Attachment 8) outlines the chronology, including the independent expert from the National Institute of Corrections (Attachment 9). As the above indicates the Compliance Officer role was strictly defined and limited in the food service area, with court orders and direct court action the rule.

The final issue concerning the court's June 17 and July 28 orders is now moot, since the order has been modified as Judge Avakian advised. In addition I never had reason to invoke the order while it was in force.

Your description of the situations under which the Act would require information, i.e., if someone were a source of income wherein I was employed by, or in some way received financial benefit (referral fee) from, a person who was employed by or in Santa Clara County clarified the exact application of the Act. I hope that the above information is useful to you in assessing the position of Compliance Officer. I agree with the premise and purpose of the Act, and my only concern was the motivation of the County Counsel in submitting the review to you. Coming as it did on the heels of Mr. Clark's attempt to first seek the judge, and then counsel, to disqualify the Compliance Officer, it did not appear as an isolated incident. I do appreciate your advice and hope the above information and facts are helpful to you. I will be most happy to furnish any additional information to assist you.

Sincerely yours,



THOMAS F. LONERGAN

cc: all counsel