



California Fair Political Practices Commission

March 6, 1987

Pat Towner
Executive Director
Commission on the Status
of Women
926 J Street, Room 1003
Sacramento, CA 95814

Re: Your Request for Advice
Our File No. A-87-038

Dear Ms. Towner:

You have written on behalf of the Commission on the Status of Women (the "commission") seeking formal written advice pursuant to Government Code Section 83114(b) regarding the application of the Political Reform Act (the "Act")^{1/} to the commission's role in appointing members to the Sexual Assault Advisory Committee (the "committee"). You have asked your agency's counsel, Deputy Attorney General Kathleen Mikkelson, to address related questions concerning Sections 1090-1097 and Public Contract Code Sections 10410 and 10430. We will not address those issues here as they are outside the purview of the Act.

QUESTIONS

1. How would Section 87100 affect a person appointed by the commission to the committee if she were also an employee of a rape crisis center which receives funds approved by the committee?

2. Could the committee's voting be structured in such a way that the appointee could first disqualify herself from participating in the funding decision for the center where she works, and then participate in subsequent funding decisions?

^{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.

3. If district attorney appointees to the committee come from offices which also receive funds from the committee, are such appointees restricted in their participation by the terms of Section 87100?

CONCLUSIONS

1. An employee of a rape crisis center which receives or seeks to receive funds approved by the committee must disqualify herself from participation in decisions on the funding for her employer and decisions which will affect the funding or expenses of her employer in a manner that is foreseeable, material, and distinguishable from the effect on all other rape crisis centers.

2. The committee's procedures may be structured to permit the employee to participate in decisions which involve funding for other rape crisis centers, once funding for her employer has been resolved.

3. Representatives from district attorneys' offices which also receive funds from the committee are not required to disqualify themselves.

FACTS

The Sexual Assault Advisory Committee is established pursuant to Penal Code Sections 13836 and 13836.1. Section 13836 provides:

The Office of Criminal Justice Planning shall establish an advisory committee which shall develop a course of training for district attorneys in the investigation and prosecution of sexual assault cases, child sexual exploitation cases, and child sexual abuse cases and shall approve grants awarded pursuant to Section 13837....

(Emphasis added.)

The committee consists of 11 members. Five are appointed by the executive director of the Office of Criminal Justice Planning, including three district attorneys or assistant or deputy district attorneys. Six are public members appointed by the Commission on the Status of Women, including one representative of a rape crisis center.

Members of the committee receive no compensation for their services, but are reimbursed for expenses actually and

necessarily incurred by them in the performance of their duties. Staff support for the committee is provided by the Office of Criminal Justice Planning. Grants are approved by the committee pursuant to Penal Code Section 13837.

The Office of Criminal Justice Planning provides grants to proposed and existing rape crisis centers and prevention programs. Grant recipients provide services which are determined to be appropriate by the advisory committee as grant conditions. The advisory committee identifies the criteria to be utilized in awarding the grants before any funds are allocated. In order to be eligible for this funding, the centers must demonstrate an ability to receive funds from governmental, voluntary, philanthropic, and other sources. State funds provided to establish centers are to be utilized when possible, as determined by the advisory committee, to expand the program.

ANALYSIS

The Act provides that no public official shall make, participate in making or use her official position to influence the making of any governmental decision in which she has a financial interest. (Section 87100.)

Unsalariated members of "advisory committees" often do not make or participate in making governmental decisions. (See Section 82019 and Regulation 18700, copy enclosed.) However, in this instance, the statutes make it clear that the committee plays a key, decision-making role in the grant award process. (See Penal Code Sections 13836, 13837.) Hence, its members are public officials whose decision-making activities are subject to the Act's conflict of interest provisions.

An official has a financial interest in a governmental decision if it will have a reasonably foreseeable material financial effect upon the official, a member of her immediate family, or on any of several designated economic interests, and the effect is distinguishable from the decision's effect upon the public generally. (Section 87103.) Among the designated economic interests are the following:

...(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....

Section 87103(c) and (d).

Question 1:

The required "representative of a rape crisis center" could be an employee, a board member of a center, or a volunteer who works at such a center. Our analysis is different for each of these possibilities.

You have advised me that the rape crisis centers are nonprofit, tax-exempt organizations. Hence, they are not "business entities" within the meaning of the Act. (Section 82005.) If an employee is paid a salary, the center is a source of income to that employee. However, reimbursement for travel expenses and per diem paid to a volunteer or to a board member would not make the center a source of income. (Sections 82030(a) and (b)(2).) Thus, for an employee, Section 87103(c) will apply and can form the basis for disqualification under Section 87100. For a board member or volunteer, Section 87103(c) does not apply. Furthermore, because the center is not a business entity, Section 87103(d) is also inapplicable.

Consequently, for a board member or volunteer, there is no disqualifying financial interest pursuant to the Act, and disqualification would not be required by the Act's provisions. For an employee, disqualification will be required as to any decision which will have a reasonably foreseeable material financial effect upon the center which employs her. Thus, disqualification is required if the center is the subject of the decision, such as a grant application. (Regulation 18702.1(a)(1) and (b), copy enclosed.) However, disqualification is not required if the effect of the decision on the center will not be distinguishable from its effect on the public generally. (Regulation 18702.1(c)(1).)

The application of the "public generally" exclusion is detailed in Regulation 18703, as follows:

A material financial effect of a governmental decision on an official's interests, as described in Government Code Section 87103, is distinguishable from its effect on the public generally unless the decision will affect the official's interest in substantially the same manner as it will affect all members of the public or a significant segment of the public. Except

as provided herein, an industry, trade or profession does not constitute a significant segment of the general public.

...(c) An industry, trade or profession constitutes a significant segment of the public if the statute, ordinance or other provision of law which creates or authorizes the creation of the official's agency or office contains a finding and declaration, including an express reference to Section 87103 of the Government Code....

(d) In the absence of an express finding and declaration of the type described in subsection (c) of this section, such an industry, trade or profession constitutes a significant segment of the public generally only if such a finding and declaration is implicit, taking into account the language of the statute, ordinance or other provision of law creating or authorizing the creation of the agency, the nature and purposes of the program, any applicable legislative history, and any other relevant circumstance.

As can be seen from the foregoing, if the committee had been established by the Legislature to regulate a particular "industry, trade or profession," the Legislature could have made an express finding to permit employees or members of that industry, trade or profession to participate in decisions affecting that industry, trade or profession. In the alternative, such findings could be determined to be implicit in the legislation which established such a regulatory body. (Regulation 18703(d); see, Consumers Union v. Calif. Milk Producers Advisory Bd. (1978) 82 Cal. App. 3d 433.) Under either of those circumstances, an employee or a member of the industry, trade or profession could participate in decisions affecting his or her employer or business entity, as long as those decisions affected all other members of the industry, trade or profession in substantially the same manner. (Regulation 18703.)

In the instant situation, rape crisis centers are not business entities and hence do not constitute an "industry, trade or profession" in the typical sense. However, at least by analogy, it seems appropriate to conclude that under all of the facts here, an employee of a rape crisis center, who is appointed as the "representative" required by statute, may participate in committee decisions which affect all rape crisis

centers in substantially the same manner.^{2/} For those decisions which will affect her employer in a manner which is not substantially the same as for other centers, such as decisions on the awarding of grants to her employer, she must disqualify herself. This may include decisions involving the establishment of formulas for funding, if the formulas will affect the level of funding for her employer. If an employee of a center is appointed, she may wish to consult us for further advice on this point.

Question 2:

You have also asked whether it is possible for an employee "representative" to participate in decisions regarding funding for other centers so long as she disqualifies herself as to funding for her employer. As long as the requirements discussed above are satisfied, such participation is permitted. In several circumstances over the years, we have advised that complex decisions, such as budgets, could be separated into discrete components. As long as each component may be determined independently of the others, once the component requiring disqualification has been resolved without the official's participation, the official may participate as to subsequent components. (See Advice Letter to Raymond A. Amrhein, No. A-77-068; Advice Letter to John Cook, No. A-83-163; and Advice Letter to Jeffrey D. Huffaker, No. A-86-343, copies enclosed.)

Question 3:

You have also asked what disqualification requirements, if any, apply to representatives selected from district attorneys' offices which may also receive funding as a result of decisions made by the committee. Because these committee members are public employees, their employers are not "sources of income" within the meaning of Section 87103(c), and are not business entities under Section 87103(d). (See Sections 82005 and 82030(b)(2).) Consequently, as with board members or volunteers from rape crisis centers, there is no basis for disqualification under Section 87100.

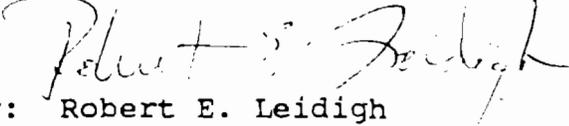
^{2/} In applying Regulation 18703(d) by analogy, we are mindful that the economic interests involved in this situation are not for-profit entities, but are, instead, nonprofit, charitable organizations. Under these circumstances, a liberal application of the requirements of subdivision (d) seems appropriate.

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If you have 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
Enclosures

anticipated that these training programs will last two and a half days each and that one will be held in Northern and one in Southern California. See Chapter III, page 20, of this RFP for further information on budgeting this item.

D. Eligibility Criteria

The eligibility criteria described below serves two purposes:

- To define for potential applicants the minimum requirements and commitments for participating in the program.
- To serve as a basic screening device allowing the limited amount of funds available to be directed toward those applicants with the highest potential for establishing a successful and effective project.

Items 1 through 4 are eligibility criteria included in the enabling statute, Senate Bill 862 (Chapter 917, 1980 Statutes). The remaining items were added by the SAC in conjunction with OCJP.

1. OCJP shall provide grants to proposed and existing rape victim counseling centers. A rape victim counseling center means an organization also known as a "rape crisis center" which: (1) operates a 24 hour telephone counseling service for the purpose of providing crisis intervention services to victims of sexual assault; (2) advocates the improved treatment of sexual assault victims by the criminal justice system, service providers, and the community; and (3) provides information directed toward the prevention of sexual assault.

Memorandum

To : Pat Towner, Executive Director
Commission on the Status of Women

Date : October 30, 1986

File No.:

Telephone: ATSS (8)597-3991
(415)557-3991

From : Kathleen Mikkelson
Office of the Attorney General
Deputy Attorney General

Subject: Appointments to Sexual Assault Advisory Committee

Dear Pat:

You have requested advice on whether the Commission can appoint an individual who works on the staff of a rape counseling center or who serves on the board of such a center to serve on a sexual assault advisory committee established pursuant to Penal Code §§13836 et seq. Penal Code §13836.1 provides that six public members of the advisory committee shall be appointed by the Commission on the Status of Women, one of whom shall be a representative of a rape crisis center.

Because one of the major functions of the sexual assault advisory committee is to make recommendations to the Office of Criminal Justice Planning regarding grants to local rape, child sexual exploitation, and child sexual abuse counseling centers, the proposed appointment poses conflict of interest problems.

There are three statutes which apply to the potential conflict of interest which would result from the Commission's proposed appointment. Public Contract Code §10410 provides:

"No officer or employee in the state civil service or other appointed state official shall engage in any employment, activity, or enterprise from which the officer or employee receives compensation or in which the officer or employee has a financial interest and which is sponsored or funded, or sponsored and funded, by any state agency or department through or by a state contract unless the employment, activity, or enterprise is required as a condition of the officer's or employee's regular state employment. No officer or employee in the state civil service shall contract on his or her own individual behalf as an independent contractor with any state agency to provide services or goods."
(Emphasis added.)

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A member of the Sexual Assault Advisory Committee would be considered a public officer because he or she holds an office created by statute, has a position which is continuing rather than occasional, and exercises some part of the sovereignty of the state. Thus the above statute would prohibit the proposed appointee from serving on the Committee unless the appointment falls within one of the exceptions to §10410 contained in §10430.

Section 10430 was amended this year by Senate Bill 1989 to include an exemption for "members of boards or commissions who receive no payment other than payment of each meeting of the board or commission, payment for preparatory time, and payment for per diem." The amendment is effective January 1, 1987, and would apply to this situation since Penal Code Section 13836.1 provides that members of the advisory committee shall receive no compensation for their services but shall be reimbursed for expenses actually and necessarily incurred by them in the performance of their duties.

The above provision is declaratory of existing law, according to section 4 of the bill. Thus this statute should not preclude the appointment, although to be on the safe side the appointment could be made effective January 1, 1987.

Sections 1090-1097 of the Government Code also relate directly to conflicts of interest. Section 1090 provides that state officers "shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members." However, §1090 is qualified by §1091 which defines certain interests as "remote interests" and provides that as to such interests the officer must disclose to the board and the board may approve the contract by vote of its membership without counting the vote of the member with the remote interest. §1091(b) defines a "remote interest" as that of an officer or employee of a nonprofit corporation. Thus assuming the rape counseling center is a nonprofit corporation, the proposed appointee could serve on the committee if he or she discloses the employment by the rape center and the committee notes it in its official records. A president of the board of a nonprofit corporation would presumably have the equivalent remoteness of interest as an officer of such a corporation.

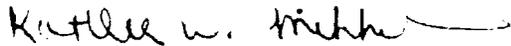
Finally, Government Code §7100 provides that "no public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest." Section 87103 defines financial interest to include any business entity in which the

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public official is employed. No exemption exists for non-profit corporations. Pursuant to these provisions the appointee, if employed by the rape counseling center, could not vote or participate in influencing votes on any grants of money to the rape center by which she is employed. A board member, since not employed by the Center, would not be so limited in his or her voting and was probably the type of representative of a rape crisis center contemplated by Penal Code Section 13836.1 for appointment to the Committee.

To summarize, an employee or officer of a rape counseling center could be appointed to the Committee, preferably on or after January 1, 1987. An employee would not be able to vote or participate in any grants to the rape center which employs him or her even if the grant is one generally to all centers funded by the Office of Criminal Justice Planning.

Very truly yours,



KATHLEEN W. MIKKELSON
Deputy Attorney General.

KM:pk

CC: Arlene Nielsen
Beverly Tucker,

California
Commission on the Status of Women
Office of the Executive Director

FEB 3 9 58 AM '87

February 6, 1987

Dear Bob,

Thank you for responding to my letter so quickly. I have enclosed a copy of the definition of a "rape crises center", which was provided to me by OCJP. I also include a copy of the memo provided to us by Kathy Mikkelson, Office of the AG, who acts as our counsel.

In response to your question as to whether or not we would like a formal opinion or an informal letter of advice, we would like an informal letter of advice, unless of course Kathy has advised against that.

Once again, thanks for your prompt attention to this matter.

Cordially,



Pat Towner
Executive Director

Memorandum

To : Dianne Griffiths, Chief
Legal Division
Fair Political Practices Commission
428 J Street, Suite 800
Sacramento, CA 95814

FEB 2 10 17 AM '87
Date: January 30, 1987Subject: REQUEST FOR LEGAL
OPINION PURSUANT
TO G.C. 83114

From : Pat Towner
Executive Director

Pursuant to Government Code Section 83114, as Executive Director it is within my purview to request an opinion regarding duties under the Political Reform Act.

The California Commission on the Status of Women voted at its November 17, 1986, meeting to request a formal opinion from the Fair Political Practices Commission regarding its ability to appoint an employee of a rape crisis center which receives funds from the Sexual Assault Advisory Committee to serve on that committee. The Commission's counsel, Kathleen W. Mikkelson, Deputy Attorney General, prepared the attached memo in which she concluded that such an appointment raised conflict of interest problems pursuant to Government Code Section 87100 et seq. However, because the Commission has in the past appointed such employees, and because Penal Code Section 13836.1, authored by Commissioner Diane Watson, provides that one of the Commission's six appointees to the committee shall be a representative of a rape crisis center, the Commission wanted a more formal opinion.

Upon advice from the Attorney General's Office we are requesting an opinion from the Fair Political Practices Commission. The questions which the Commission would like addressed in this opinion are as follows:

1. What restrictions would Government Code Section 87100 place on a person appointed by the Commission to the Sexual Assault Advisory Committee established pursuant to Penal Code Section 13836 et seq. if she were an employee of a rape crisis center which receives funds from the committee when the principal function of the committee is to vote on formulas and guidelines for funding the rape crisis centers?
2. Could the committee's voting be structured in such a way that the appointee could first abstain from voting on the funding for the center where she worked, and then participate in all subsequent funding decisions?

3. Penal Code Section 13836.1 provides that the Office of Criminal Justice Planning shall appoint five persons to the committee, three of whom shall be district attorneys, or assistant or deputy district attorneys; if the district attorney appointees come from offices which also receive funds from the committee, are such appointees also restricted in their voting by the terms of Government Code Section 87100 and if so, how?

We would appreciate a response to these questions prior to our March 16, 1987 meeting, at which time we wish to make an appointment of a representative of a rape crisis center to the committee; currently, no one on the committee is such a representative.

Thank you for your assistance.

PT:drs

cc: CCSW Commissioners
Kathy Mikkelson



California Fair Political Practices Commission

February 6, 1987

Pat Towner
Executive Director
Commission on the Status
of Women
926 J Street, Room 1003
Sacramento, CA 95814

Re: 87-038

Dear Ms. Towner:

Your letter requesting an opinion under the Political Reform Act was received on February 2, 1987 by the Fair Political Practices Commission. If you have any questions about your request, you may contact Robert E. Leidigh, an attorney in the Legal Division, directly at (916) 322-5901.

Mr. Leidigh has had conversations with you and with Deputy Attorney General Kathy Mikkelson. Both of you have agreed that your request be treated as one for staff written advice pursuant to Section 83114(b) rather than a formal opinion pursuant to Section 83114(a). You are forwarding to us a copy of Ms. Mikkelson's memorandum which was referred to in your correspondence to me.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or more information is needed, you should expect a response within 21 working days of receipt of all the information. You also should be aware that your letter and our response are public records which may be disclosed to the public upon receipt of a proper request for disclosure.

Very truly yours,

A handwritten signature in cursive script that reads "Diane M. Griffiths".

Diane M. Griffiths
General Counsel

DMG:plh