



California Fair Political Practices Commission

December 21, 1987

Sharon Stevenson
Staff Counsel
Dispute Resolution Advisory Council
Consumer Services, Legal Services Unit
1020 N Street
Sacramento, CA 95814

Re: Your Request for Informal
Assistance; Our File
No. I-87-261
Follow-Up to I-87-184

Dear Ms. Stevenson:

You have written requesting follow-up assistance regarding our response to Mr. Goldstein's previous request, No. I-87-184. You have written at Mr. Goldstein's behest, in your capacity as counsel for the Dispute Resolution Advisory Council. You and I have had several telephone conversations in which I have given you assistance and in which you have modified your request. You have asked that I send to you written confirmation of my telephonic advice. That is the purpose of this letter.

QUESTIONS

1. May Dispute Resolution Advisory Council member Michael Goldstein participate in council deliberations regarding the guidelines for counties to use in funding dispute resolution programs if the proposed guidelines are bifurcated into two packages, one which deals with procedural matters and the other which deals with funding eligibility matters?

2. With respect to those matters as to which Mr. Goldstein may be disqualified, what is the scope of the prohibition on his participating in council decisions or on his use of his official position to influence such decisions?

CONCLUSIONS

1. If the proposed guidelines can be bifurcated, so that the guidelines to determine criteria for selecting among competing programs for funding by counties are separated out, then Mr. Goldstein may participate in the deliberations regarding the procedural matters.

2. Participating in a governmental decision includes preliminary negotiations, discussions, reasoning, compromises, planning, rewording, and lobbying of other members of the council.

FACTS

For a more complete statement of the facts, reference is made to our earlier advice letter, No. I-87-184. In summary, Mr. Goldstein is the paid executive director of a dispute resolution program operating in the Bay Area. As such, his program is a source of income to him within the meaning of the Political Reform Act (the "Act").^{1/} (Section 87103(c).) Mr. Goldstein has been appointed to the Dispute Resolution Advisory Council, which is established by statute to develop guidelines to be followed by counties in awarding dispute resolution grants to programs for serving county residents. Funds for these grants are generated by increased court filing fees. Mr. Goldstein's program will foreseeably be competing to become one of the funded programs under the guidelines adopted by the council.

In our earlier letter to Mr. Goldstein, we concluded that he would likely be disqualified from participating in certain decisions of the council which deal with the establishment of criteria for selecting which programs will be funded by the counties. You now agree with that conclusion and have asked the follow-up question regarding bifurcation of the guidelines into the eligibility issues and the procedural issues. The latter would involve such things as required reporting, periodic audits of funded programs, etc.

ANALYSIS

As we stated in the Advice Letter to Pat Towner, No. A-87-038, (copy enclosed with the previous letter) and other letters cited therein, an official may participate in 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.

where the components which could affect the official's interests were severable from those which could not. The bifurcation which you have proposed in this case seems appropriate. You have indicated that you will furnish me with the two sets of proposed guidelines as soon as they have been firmed up so that I may review them.

On the issue of what activities would constitute participation in a decision, the relevant Commission regulation, Regulation 18700(c), states as follows:

(c) A public official or designated employee "participates in the making of a governmental decision" when, acting within the authority of his or her position, he or she:

(1) Negotiates, without significant substantive review, with a governmental entity or private person regarding the decision; or

(2) Advises or makes recommendations to the decision-maker, either directly or without significant intervening substantive review, by:

(A) Conducting research or making any investigation which requires the exercise of judgment on the part of the official or designated employee and the purpose of which is to influence the decision; or

(B) Preparing or presenting any report, analysis or opinion, orally or in writing, which requires the exercise of judgment on the part of the official or designated employee and the purpose of which is to influence the decision.

I also enclose a copy of Regulation 18700.1 which discusses using one's official position to influence a decision.

For a more in-depth discussion of what constitutes participating in making, or using one's official position to attempt to influence a governmental decision, please review the enclosed Advice Letter to Dianne Feinstein, No. A-84-057. That letter enumerates a number of activities which constitute such actions. These activities include preliminary negotiations, discussions, reasoning, compromises, etc.

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I trust that this letter accommodates your request and provides the information which you seek. Once the packages of guidelines have been firmed up, please forward them for my review, so that I may be of further assistance.

Sincerely,

Diane M. Griffiths
General Counsel

By: Robert E. Leidigh
Counsel, Legal Division

DMG:REL:plh
Enclosures



DIVISION OF CONSUMER SERVICES

LEGAL SERVICES UNIT
1020 N STREET
SACRAMENTO, CALIFORNIA 95814
TELEPHONE: (916) 445-5126



October 15, 1987

Ms. Diane Griffiths
General Counsel
Fair Political Practices Commission
428 J Street, Suite 800
Sacramento, CA 95804-0807

Re: Request for Informal Assistance, File No. I-87-184

Dear Ms. Griffiths:

Thank you very much for your letter of August 17, 1987, regarding the participation of Mr. Michael Goldstein on the Dispute Resolution Advisory Council (Council). Since the Council is in its embryonic stage and the issues it confronts are becoming increasingly clear, we find it necessary to ask for your further assistance on this matter.

Although your initial letter, based upon facts supplied to you by Mr. Goldstein, does offer some illumination as to the restrictions on Mr. Goldstein's efforts with the Council, I believe that we can provide you with further pertinent information that may well alter the premise from which you formed your informal opinion. More specifically, I have read the Advice Letter to Pat Towner, No. A-87-038 and Mr. Goldstein's letter of June 26, 1987, and have determined that there may be some confusion regarding the varying roles of the governmental agencies involved.

As you may recall, Ms. Towner was a member of the Sexual Assault Advisory Committee (Committee). Among other duties, the Committee was responsible for the approval of grants to qualified rape crisis centers. Ms. Towner was in the peculiar position of being both a member of the Committee and an employee of a rape crisis center which would otherwise be eligible for Committee approved funding. Mr. Goldstein is in a similar, but distinguishable, position.

The Council is responsible for developing eligibility guidelines and procedures to be utilized by the counties when awarding grants to local dispute resolution programs. Although the Council is drafting the procedures for the counties' use,

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neither the Council as a whole nor its members have anything whatsoever to do with implementing these rules.

Therefore, unlike Ms. Towner, Mr. Goldstein is not at all involved in the funding approval process for the individual programs. The allocation of the grants is handled strictly at the county level. It would seem that Ms. Towner's role with the Committee was much more sensitive and created a greater conflict of interest than Mr. Goldstein's since the Committee actually reviewed the individual applications and allocated the funds to organizations such as her employer.

As you are aware, the letter to Pat Towner advised her that although the Committee approves grants to rape crisis centers such as the one which employs her, she would still be able to continue with her role as a Committee member as long as she disqualified herself from decisions regarding the award by the Committee of funding grants to her employer. In addition, she was permitted to participate in the approval or disapproval of funding applications from other rape crisis centers. Since Mr. Goldstein's duties with the Council merely would be to establish policy and procedures for the counties, it would appear that any action taken would have an equal effect upon the dispute resolution programs within the state as a whole. There is no possibility that Mr. Goldstein's participation could result in unfair favoritism for his employer, as could Ms. Towner's actions. Since Mr. Goldstein is one of seven Council members responsible for creating statewide policy, his action on the Council is diluted by the votes of the other six members.

In view of these facts, we are hopeful that you would agree that Mr. Goldstein should be given even greater latitude than Ms. Towner. After all, Mr. Goldstein's actions can give little rise to suspicion since he is powerless to improve the position of his employer in its efforts to secure funding as grant approval is obtained at the county level. On the other hand, Ms. Towner was intimately involved in the allocation funds. It would be incongruous to place stronger restrictions on Mr. Goldstein than were placed on Ms. Towner.

Furthermore, we believe that nonprofit dispute resolution programs should receive the same liberal treatment under §87103(d) of the Government Code as do nonprofit rape crisis centers. If the purpose of the analysis is to determine whether a decision of the Council will have an effect on Mr. Goldstein's employer which is distinguishable from its effect on the public generally, it would appear relatively clear that the power of the Council is to create statewide policy and will not make any decisions that effect local programs. There may have been some

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lack of clarity in the drafting of the Council's enacting legislation regarding the employment status of the appointed members with experience in the field of dispute resolution, but we are not certain why such a drastic distinction has been drawn.

Although the language of §467(b) of the Business and Professions Code does not specifically refer to the appointment of a representative from a dispute resolution program, it does require that four persons with at least two years of industry experience be included in the Council's membership. The practice of dispute resolution is a relatively new art and expertise in the field is not widespread. Consequently, the appointing powers are necessarily required to look for candidates who are currently involved in the industry.

The purpose of including industry members on any governmental panel is to have them offer their expertise and practical knowledge to the public members when formulating policy. While the enacting legislation for the Council and the Committee differs as to specific language, the meaning appears basically the same. To read this provision to mean that the members with the qualifying experience who are presently involved in the practice of dispute resolution are unable to take part in the promulgation of the guidelines defies logic.

We are hopeful that these supplemental facts will be of service to you in providing us with further analysis in this area. Again, we appreciate very much your earlier attention to this matter. We look forward to hearing from you in the near future.

Sincerely,

MARY-ALICE COLEMAN
Executive Officer, Dispute
Resolution Advisory Council


By Sharon Stevenson
Staff Counsel
Dispute Resolution
Advisory Council

MAC:SS

cc Robert E. Leidigh



California Fair Political Practices Commission

August 17, 1987

Michael J. Goldstein
California Community Dispute Services
445 Bush Street, Second Floor
San Francisco, CA 94108

Re: Your Request for Informal
Assistance
Our File No. I-87-184

Dear Mr. Goldstein:

You have written requesting advice regarding your participation as a member of the Dispute Resolution Advisory Council. I have previously forwarded to you a copy of our Advice Letter to Pat Towner, No. A-87-038, which dealt with somewhat similar circumstances. This letter more directly responds to your question and includes the additional facts provided by you in our telephone conversation of July 30, 1987.

At this time, you have not presented us with facts regarding any pending decision before the advisory council. Consequently, our advice is general in nature, and we have elected to treat your letter as one requesting informal assistance.^{1/}

QUESTION

Are there any prohibitions under the Political Reform Act^{2/} on your full participation as a member of the Dispute Resolution Advisory Council?

^{1/} Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Government Code Section 83114; 2 Cal. Adm. Code Section 18329(c)(3), copy enclosed.)

^{2/} Our advice is confined to the provisions of the Political Reform Act. You may also wish to seek advice from your agency's counsel regarding Government Code Section 1090.

CONCLUSION

You must disqualify yourself from participation in any advisory council decisions which will have a reasonably foreseeable material financial effect on your employer, California Community Dispute Services.

FACTS

You are the executive director of California Community Dispute Services in San Francisco, a position which you have held for more than three years. As executive director, you are responsible for the organization's fundraising and planning efforts, fiscal and personnel policy development, and management tasks. California Community Dispute Services is a nonprofit tax-exempt organization.

On January 12, 1987, you were appointed to the Dispute Resolution Advisory Council. The council was established by recent legislation (Chapter 1313, Stats. 1986), and its responsibilities are defined in Business and Professions Code Section 465, et seq. Generally, the legislation seeks to encourage the establishment of dispute resolution programs in local communities as alternatives to use of the courts. The advisory council is established within the Department of Consumer Affairs and consists of seven appointees, of which you are one. The legislation establishing the advisory council provides:

... At least four persons appointed to the advisory council shall be active members of the State Bar of California, and at least four persons appointed to the advisory council shall have a minimum of two years of direct experience in utilizing dispute resolution techniques....

Business and Professions
Code Section 467(b).

The duties of the advisory council include the adoption of rules and regulations to effectuate the purposes of the program, including, but not limited to, guidelines to be used by the programs for the recruitment and training of persons conducting dispute resolution, and provisions for periodic monitoring and evaluation of the programs funded pursuant to this chapter. The council also is responsible for establishing guidelines to evaluate the performance of participating programs.

Programs are to be selected for funding by counties, utilizing funds generated by a \$1.00 increase in certain civil litigation filing fees.

(a) A program funded pursuant to this chapter shall be operated pursuant to contract with the county and shall comply with all of the requirements of this chapter and the rules and regulations of the advisory council.

(b) Counties may establish a program of grants to public entities and nonpartisan nonprofit corporation for the establishment and continuance of programs to be operated under the requirements of this chapter and the standards developed by the advisory council....

Business and Professions Code
Section 476.1(a) and (b).

ANALYSIS

The Political Reform Act (the "Act")^{3/} provides that no public official shall make, participate in making, or use his official position to influence a governmental decision in which he has a financial interest. As a member of the advisory council, you are a public official.^{4/} The decisions of the advisory council are governmental; for example, the adoption of rules and regulations is "quasi-legislative administrative action" under Section 82002. (Regulation 18202.)

Consequently you may not make or participate in making advisory council decisions in which you have a financial

^{3/} 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.

^{4/} Although positions on the advisory council are unsalaried and it is denominated "advisory," it clearly makes governmental decisions because it is specifically empowered to adopt rules and regulations. Consequently, advisory council members are public officials within the meaning of the Act. (Section 82048; see Comm'n. on Calif. State Gov't. Org. & Econ. v. FPPC (1977) 75 Cal.App.3d 716.)

interest. You have a financial interest in a decision if it will have a reasonably foreseeable material financial effect, distinguishable from the effect on the public generally, on yourself, a member of your immediate family, or on:

(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.

Section 87103(c).

California Community Dispute Services is a nonprofit tax-exempt organization. Therefore, it is not a "business entity" within the meaning of the Act. (Section 82005.) However, you are the paid executive director and, therefore, receive payments other than reimbursement for expenses. As a result, California Community Dispute Services is a source of income to you. (Sections 82030 and 87103(c).) Consequently, you must disqualify yourself from any advisory council decisions which will have a reasonably foreseeable material financial effect on California Community Dispute Services which is distinguishable from the effect on the public generally.

Decisions affecting the funding of California Community Dispute Services would have effects distinguishable from those on the public generally. However, if the provisions of either subdivision (c) or subdivision (d) of Regulation 18703 are applicable, the result could be different. That regulation provides as follows:

(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, to the following effect:

The Legislature [or other authority] declares that the individual[s] appointed to the office of _____ is [are] intended to represent and further the interest of the [specified industry, trade or profession], and that such representation and furtherance will ultimately serve the public

interest. Accordingly, the Legislature [or other authority] finds that for purposes of persons who hold such office the [specified industry, trade or profession] is tantamount to and constitutes the public generally within the meaning of 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.

Regulation 18703.

In this instance, as in the Towner Advice Letter previously forwarded to you, subdivision (c) of Regulation 18703 does not apply. In recently adopting the statutes establishing and governing the advisory council, the Legislature did not make the express findings set forth in that subdivision. Nor can we conclude that such findings are implicit in the statute, as provided for by subdivision (d).^{5/} Consequently, we must conclude that effects upon dispute resolution centers generally do not constitute an effect upon a significant segment of the general public within the meaning of Section 87103 and Regulation 18703.

Therefore, you will be required to disqualify yourself as to those decisions of the advisory council which will have a reasonably foreseeable material financial effect on your source of income. For guidance on this point, we refer to Regulation 18702(b)(3). The pertinent provisions of that regulation are as follows:

^{5/} The statute does not require that employees of dispute resolution programs be included in the membership of the advisory council. In fact, it does not even require membership from representatives of such programs. The statute merely requires membership of persons with experience in dispute resolution techniques. (Business and Professions Code Section 476(b).)

Michael J. Goldstein
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(3) Whether, in the case of a source of income as defined in Government Code Section 87103(c), of two hundred fifty dollars (\$250) or more received by or promised to a public official within 12 months prior to the time the decision is made:...

(B) There is a nexus between the governmental decision and the purpose for which the official receives income; or....

(D) If the source of income is not a business entity, the decision will have a significant effect on the source.

Regulation 18702(b)(3)(B) and (D).

Since your position as executive director involves responsibility for securing grants for California Community Dispute Services, you may not use your governmental position to further that goal because there would be a "nexus" between the governmental decision and the purpose for which you receive income. (See Advice Letter to Linda Best, No. A-81-032, copy enclosed.) In addition, you must disqualify yourself from advisory council decisions which will have a reasonably foreseeable and significant effect upon California Community Dispute Services.

As the advisory council begins its work and the nature of its decisions becomes clearer, you may wish to contact us again for more specific advice. However, it seems clear from the statute establishing the advisory council that you will need to be cautious regarding your involvement in establishment of funding guidelines. (Business and Professions Code Section 471.) Those guidelines may influence whether or not your program is funded or whether a competing program is funded.

If you 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
Enclosures

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3375 62nd Street
Sacramento, CA 95820
October 21, 1986

Ms. Diane Griffiths
General Counsel
Fair Political Practices Commission
428 J Street, Eighth Floor
PO Box 807
Sacramento, CA 95804

Dear Ms. Griffiths:

I am writing to request an opinion letter determining whether I have a conflict of interest with regard to an issue currently being considered by the City of Sacramento's Toxics Commission. Pursuant to a conversation I had yesterday with Kathy Donovan in your office, I am supplying the following facts for your consideration:

1. I am a member of the Sacramento City's Toxics Commission, and have served since December 1985. The Toxics Commission has been asked by the Sacramento City Council to review a proposed ordinance which would place a moratorium on specified uses of plastic pipe. As part of its review, the Commission is holding a series of public hearings and taking testimony from interested state and local agencies, and parties in support and in opposition. Following these hearings, the Commission will submit its recommendations to the City Council which will then act on the proposal. A copy of the proposed ordinance is enclosed for your reference.
2. The proposed ordinance is sponsored by a coalition of local organizations. The coalition includes the Sacramento Area Fire Fighters, Local 522, which is a non-business labor organization representing approximately 770 firefighters in Sacramento County.
3. The Sacramento Area Fire Fighters (SAFF) belong to the Federated Fire Fighters of California (FFFC), which is a statewide, non-business organization with approximately 17,000 members. SAFF contributes monthly per capita dues of \$2.88 per member to FFFC. SAFF does not have a role in determining my salary and benefits paid by FFFC.
4. The Executive Board of FFFC has not taken and does not plan to take a position on the proposed plastic pipe moratorium.

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5. I am employed by FFFC as the organization's Health and Safety Director. My job involves providing technical assistance and educational services to the FFFC membership. I assist members in interpreting existing state laws and regulations. When applicable, I advise them that administrative enforcement mechanisms (such as the Division of Occupational Safety and Health within the Department of Industrial Relations) are available. I write and edit a bimonthly newsletter on firefighter health and safety matters. And I arrange for direct education in the form of day-long seminars and in-service trainings.

6. FFFC has a full-time registered legislative advocate who has complete responsibility for representing the membership before the Legislature and state agencies. Within FFFC, this advocate serves a separate function from myself. I occasionally provide the advocate with technical information on health and safety issues, but I do not advocate on behalf of the organization. The advocate will not be appearing before the City Toxics Commission to testify on the proposed plastic pipe moratorium.

7. FFFC has received monies for the purposes of developing scientific test protocols for measuring the combustion toxicity of plastic pipe materials. These monies have come from the State Fire Marshal (1985-1986) and a private company involved in the manufacture of steel pipe. The studies necessary to develop protocols have not been completed, and no conclusions regarding the toxicity of plastic pipe have been reached. While I did provide technical assistance within the organization when the possibility of conducting tests was first discussed, the project has been contracted out to experts in the field. I am not involved in the project's implementation and my salary is not affected by the funding received.

8. The local law firm of Olson, Connelly, and Hagel is providing me with an opinion letter which states their determination that I do not have a conflict of interest in this matter. I should receive their letter before the end of this week, at which time I will provide you a copy. In the meantime, for your information, the attorney who researched my case is Susan Christian. She can be reached at 916-442-2952.

9. The City Toxics Commission held the first hearing on the

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proposed ordinance last night, Monday, October 20. In light of the varying opinions regarding my status in this matter, and based on advice from your office, I sat with the Commission during the hearing but did not participate in that I did not ask questions and did not state my opinion on any matter. The next hearing is scheduled for Monday, November 3, 1986 at 7 p.m. While realizing that this date is less than two weeks away, I would appreciate anything your office can do to advise me prior to the next hearing.

Sacramento City Attorney Jim Jackson's office has considered the issue of my participation in the Toxics Commission's review of the proposed ordinance, but has not issued an opinion letter. If you wish to talk with his office, you may contact Deputy City Attorney Diane B. Balter at 916-449-5346.

Thank you very much for your consideration of my request. If you have any questions, please do not hesitate to contact me at 916-441-7650 (work) or 916-457-6772 (home).

Sincerely,



Kim Mueller