



California Fair Political Practices Commission

January 15, 1988

Donald E. Smith
L. Barry Mack
3001 East Tahquitz-McCallum Way, Suite 105
Palm Springs, CA 92262-6982

Re: Your Request for Advice
Our File No. A-87-305

Dear Mr. Smith:

You have requested advice on behalf of Michael McCabe, Susan Marx, and Minna Maryanov about application of the Political Reform Act (the "Act") to their duties as members of the Board of Education of the Palm Springs Unified School District.^{1/}

QUESTIONS

The former superintendent of schools for the Palm Springs Unified School District is suing the school district, the board of education, three board members, and two district employees for contract, tort and punitive damages.

1. May the three board members, who also are being sued in their individual capacities, participate in the board of education's deliberations about settling the lawsuit?

2. May the same three board members participate in the board's deliberations on a settlement or judgment for punitive damages against them?

CONCLUSIONS

1. The board members may participate in the board's deliberations about settling the lawsuit for general and specific contract and tort damages, if the board refrains from discussing settlement of claims for punitive damages against the individual members. State law obligates the school district to indemnify the board members for the defense and payment of claims and judgments based on injuries that arose

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

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from an employee's act that occurred within the scope of employment. Therefore, the board members do not have a financial interest in the terms of a settlement for general and special damages.

2. The three board members are disqualified from participating in board deliberations on a claim, settlement, or judgment for punitive damages for which they are liable personally. State law does not authorize the school district to insure its employees against claims for punitive damages. Consequently, the school district would have to use its own funds to pay a judgment for punitive damages against the board members. Thus, the board members' interest in not having to pay punitive damages would be adverse to the school district's interests in not incurring those costs.

However, three board members are legally required for the board quorum. One of the three disqualified board members may be chosen by lot to participate in a vote on payment of a punitive damages judgment against board members.

Our present advice applies only to the facts you have presented at this time. Since this is a new and important issue not previously addressed by the Commission itself, this year we anticipate asking for a Commission hearing on this issue. Our advice may change as a result of that hearing, but we felt it important to offer you interim advice.

FACTS

Michael McCabe, Susan Marx and Minna Maryanov are members of the five-person Board of Education of the Palm Springs Unified School District. In May 1984, Mr. McCabe, Ms. Marx and Ms. Maryanov voted to remove Eunice Jones from her position as superintendent of schools. Two other board members voted against removal.

Ms. Jones has sued the school district, the board of education, three board members individually, and two school district employees for civil damages. The first two causes of action charge the school district and board of education with breach of contract and tortious breach of contract. In the other six causes of action, Ms. Jones also sued the three board members and the two district employees for tort and punitive damages. Settlement negotiations have not begun, but a trial is set for March 14, 1988.

The school district turned the lawsuit over to its insurance company, which is defending the school district. The insurance company has reserved the right to pay Ms. Jones'

claims depending on the basis of liability -- negligent or intentional conduct. Furthermore, the company has hired separate legal counsel for the individual board members to avoid a possible conflict of interest between the district and the board members.

ANALYSIS

Mr. McCabe, Ms. Marx and Ms. Maryanov are public officials who may not make, participate in or attempt to use their official positions to influence governmental decisions in which they have financial interests. (Section 87100.) A public official has a financial interest in any decision that will have a reasonably foreseeable material financial effect on the official which is distinguishable from the effect on the public generally. (Section 87103.)

For a decision's effect to be reasonably foreseeable, there must be a substantial likelihood that the decision will affect the public official. An effect does not have to be certain to be foreseeable. If an effect were a mere possibility, it would not be foreseeable. (In re Thorner (1975) 1 FPPC Ops. 198, copy enclosed; see Witt v. Morrow (1977) 70 Cal. App.3d 817.)

If an official's personal expenses, assets or liabilities would increase or decrease by \$250 or more, the effect would be a material financial effect. (Regulation 18702.1(a)(4), copy enclosed.) Consequently, Mr. McCabe, Ms. Marx and Ms. Maryanov are disqualified from participating in any board of education decision that foreseeably would increase or decrease their personal expenses, assets or liabilities by \$250 or more.

Decision to Settle Claims for General and Special Damages

Government Code Section 825 requires the school district to indemnify its employees for the costs of defending actions and paying judgments for injuries that arise from employees' acts or omissions occurring within the scope of employment.^{2/} This code section reflects public policy that "[t]he public employee need not suffer concern over the possibility that he will be compelled to finance and oversee a tort suit filed against him

^{2/} Under Section 825(a), however, the school district may reserve its liability if the district has an agreement with the employee not to pay a claim, settlement or judgment until it is established that the employee's act occurred within the scope of employment. The Palm Springs Unified School District has no such agreement with the board members.

personally...." (Johnson v. State of California (1968) 69 Cal.2d 782, 791, 792; see Section 815.2(a).) Personal liability attaches to an employee only if the employee's act is "outside the scope of employment or performed with actual fraud, corruption, or malice." (Johnson, supra at 792.) For the purpose of Section 825, the term "employee" includes public officers, such as school district board members. (Section 810.2.)

Correspondingly, Education Code Section 35208 requires school districts to insure against the personal liability of its board members and other district employees for torts occurring within the scope of employment. Because the school district is obligated to pay a judgment against the board members for tort injuries occurring within the scope of employment and the district is insured against this expense, the three board members will not have personal financial interests in a decision to settle Ms. Jones' claims for general and special damages.

Furthermore, indemnification of district employees against general and special damages arising from acts within the scope of employment is a term or condition of a board member's office or employment. (See Schectman Advice Letter, No. A-87-226, copy enclosed.) The Commission has determined that decisions about terms and conditions of employment are not governmental decisions requiring disqualification:

(d) Making or participating in the making of a governmental decision shall not include:

(3) Actions by public officials, employees, or employee representatives relating to their compensation or the terms or conditions of their employment or contract.

Regulation 18700(d)(3), copy enclosed.

(b) Notwithstanding subsection (a) an official is not attempting to use his or her official position to influence a governmental decision of an agency covered by subsection (a) if the official:...

(3) Negotiates his or her compensation or the terms and conditions of his or her employment or contract.

Regulation 18700.1(b)(3), copy enclosed.

The school district's insurance company has undertaken the board members' defense. Absent an agreement between the school district and the board members pursuant to Section 825(a), the school district is obligated to indemnify the board members for general and special tort damages. Consequently, the three board members do not have a financial interest in the settlement of Ms. Jones' demands for general and special damages. Thus, Mr. McCabe, Ms. Marx and Ms. Maryanov may participate in the board of education's deliberations about settling the lawsuit for contract and tort damages exclusive of punitive damages.

The board must be able to separate settlement discussions concerning general and special damages from those concerning punitive damages against board members for the foregoing advice to apply. The school board has no authority to settle punitive damage claims against individual members. Moreover, as explained in the next section, the three board members have financial interests that would disqualify them from discussing settlement of punitive damages against them.

Decisions About the Settlement and Payment of Punitive Damages

In contrast to the indemnification policy for general and special damages for conduct within the scope of employment, public policy does not promote public entity payment of judgments against employees for punitive damages. (59 Ops. Atty. Gen. (1976) 204, 210.) Section 818 gives a public entity immunity from punitive damages. Furthermore, as the court recognized in Johnson, supra at 792, conduct outside the scope of employment or performed maliciously subjects an employee to personal liability.

For example, Section 990(b) and (c) authorizes a public entity, such as a school district, to insure an employee against tort liability and to insure against the expense of defending a claim against an employee, even if the claim demands punitive damages. Nevertheless, the last paragraph warns that Section 990 does not authorize a public entity to pay for or insure against or provide for paying a claim or judgment for punitive damages against an employee.

Government Code Section 825(b) is the only code section authorizing a school district to pay a judgment for punitive damages against its employee, but only if the governing body determines that the judgment meets the following three criteria:

1. The judgment is based on an employee's conduct within the scope of employment;

2. The employee's conduct was in good faith, not malicious, and in the school district's best interests, and;

3. It is in the school district's best interests to pay the judgment.

The payment of punitive damages is not mandated by the state, nor is it a term or condition of the board members' office.

Mr. McCabe, Ms. Marx and Ms. Maryanov form a majority of the board of education, which is the governing body of the Palm Springs Unified School District. Each board member has a financial interest in a claim against him for \$250 or more in punitive damages. The present claims demand \$500,000 each. Therefore, the three board members would be disqualified from participating in settlement discussions regarding those claims.

It also is reasonably foreseeable that the effect of the board's decision to pay punitive damages would be material if the judgment against a board member were at least \$250. (Regulation 18702.1(a)(4).) The school district has no insurance to pay an award for punitive damages against its employees. State law does not authorize the school district to buy such insurance. (59 Ops. Atty. Gen. (1976) 204.) Consequently, the school district would have to use its own funds to pay a judgment for punitive damages.

Moreover, partly because the state does not require the school district to indemnify its board members against punitive damages awards, the payment of punitive damages is not a term or condition of their employment. Also, Section 825(d) specifies that payment of punitive damages is not subject to collective bargaining.

Nevertheless, Section 825 authorizes the school district to pay the board members' liability for punitive damages if the board of education determines that the board members' conduct meets the criteria of Section 825(b). However, the three board members have a financial interest in having the school district pay a judgment for punitive damages of \$250 or more. Therefore, the three board members are disqualified from participating in any board of education proceedings concerning payment by the district of a judgment for punitive damages of

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at least \$250 against any of the three board members.^{3/}
Moreover, the board members may not attempt to influence other public employees about settling or paying a judgment for punitive damages against the individual board members.
(Regulation 18700.1.)

Legally Required Participation In a Governmental Decision

The board of education will not have a quorum if the three board members are disqualified from participating in board proceedings about paying punitive damages for the three board members. Nevertheless, Section 87101 allows an otherwise disqualified official to participate in a decision if his or her participation is "legally required." Regulation 18701(a) (copy enclosed) defines legally required participation as follows:

(a) A public official is not legally required to make or to participate in the making of a governmental decision within the meaning of Government Code Section 87101 unless there exists no alternative source of decision consistent with the purposes and terms of the statute authorizing the decision.

Regulation 18701(a).

If the board must consider settlement of punitive damages claims or vote on a determination pursuant to Section 825(b), one of the disqualified members will be needed for the board to have a quorum. In its Hudson opinion, the Commission recommended that a disqualified board member be chosen by "lot or other means of random selection" to make up the necessary three-person quorum. (See In re Hudson (1978) 4 FPPC Ops. 13, 18, copy enclosed.) The otherwise disqualified board member's participation is limited to voting only. He or she may not participate in discussions, unless participation is legally required because there is no "alternative means of decision-making." (In re Brown (1978) 4 FPPC Ops. 19, 25, copy enclosed.)

I hope we have answered your request for advice. We are well aware that this particular issue is extremely troubling to

^{3/} Of course, if a judgment is reached which imposes liability for punitive damages on one or two board members and absolves one or two of such liability, the member(s) absolved of such liability may participate in decisions concerning those found liable.

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local government officials. We, too, are troubled by the possible consequences of this advice, but we feel current precedent requires this result until the Commission itself has had a fuller opportunity to address the issue. We intend to recommend to the Commission that it address this issue at an upcoming Commission meeting. We welcome your participation and that of other local officials in the hearing so that we may present the Commission with a broad range of opinion on this subject. Please call me at (916) 322-5901 if you have any questions.

Sincerely,

Diane M. Griffiths
General Counsel



By: Margarita Altamirano
Counsel, Legal Division

MA:DMG:jaj

Enclosures

87-305

L. BARRY MACK
DONALD E. SMITH

DEC 15 8 30 AM '87

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A PROFESSIONAL LAW CORPORATION
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December 11, 1987

California Fair Political
Practices Commission
428 J Street, Ste. 800
P.O. Box 807
Sacramento, CA 95804-0807

ATTN: Diane M. Griffiths
General Counsel

Re: **MARYANOV, et al. adv. JONES**
Your No. 87-305

Dear Ms. Griffiths:

Thank you very much for your letter dated December 7, 1983. We will look forward to hearing from your office perhaps toward the end of December or the first week in January.

We very much appreciate your help in this regard.

Very truly yours,

L. BARRY MACK,
A Professional Law Corporation

BY: 
L. BARRY MACK

LBM:jar

cc: Darryl A. De Cuir, Esq.
Neil G. McNiece, Esq.
Susan Marx
Minna Maryanov
Lt. Michael McCabe



California Fair Political Practices Commission

December 7, 1987

L. Barry Mack
A Professional Law Corporation
3001 East Tahquitz-McCallum Way, Suite 105
Palm Springs, CA 92262-6982

Re: 87-305

Dear Mr. Mack:

Your letter requesting advice under the Political Reform Act was received on December 4, 1987 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact Margatita Altamirano, an attorney in the Legal Division, directly at (916) 322-5901.

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 if your request seeks formal written advice. If more information is needed, the person assigned to prepare a response to your request will contact you shortly to advise you as to information needed. If your request is for informal assistance, we will answer it as quickly as we can. (See Commission Regulation 18329 (2 Cal. Adm. Code Sec. 18329).)

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,

Diane M. Griffiths
Diane M. Griffiths
General Counsel *by Red*

DMG:plh

L. BARRY MACK
DONALD E. SMITH

DEC 4 7 57 AM '87

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December 1, 1987

Fair Political Practices Commission
State of California
428 "J" Street, Ste. 800
Sacramento, CA 95814

ATTN: Katheryne Donovan, Counsel
Legal Division

Re: **MARYANOV, et al. adv. JONES**
Your File: I-87-252

Dear Ms. Donovan:

This office represents Susan Marx, Minna Maryanov, and Michael McCabe as individuals and as members of the Board of Education in the above-captioned matter.

You are in receipt of a letter dated September 28, 1987 from Neil G. McNiece of the law firm of Haight, Dickson, Brown & Bonesteel which enclosed a copy of plaintiff's Second Amended and Supplemental Complaint, a brief outline of the facts surrounding the dispute, and a copy of the unpublished Appellate decision regarding Ms. Jones' Petition for Writ of Mandate.

By letter dated October 14, 1987, you responded to Mr. McNiece indicating that you were unable to grant his request contained in the above-referenced letter since he did not appear to be authorized by the officials whose duties under the Act are in question. Our firm represents the three individual Board members and has authority to request on their behalf that the Fair Political Practices Commission issue an opinion pursuant to Government Code Section 83114 stating how the Board should proceed in setting the duties and obligations of Marx, Maryanov, and McCabe.

This case is currently set for trial on March 14, 1988 in the Indio Branch of the Riverside Superior Court. If any further information or documentation regarding any aspect of this litigation will aid you in advising the individual Board members, please immediately notify the undersigned.

(cont.)

December 1, 1987
Katheryne Donovan, Counsel
Legal Division
Fair Political Practices Commission
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It is requested that the Commission provide copies of its opinion to our firm, Mr. McNiece, and Darryl A. De Cuir of Chase, Rotchford, Drukker & Bogust at 600 N. Arrowhead Avenue, Suite 201, San Bernardino, CA 92401.

Very truly yours,

L. BARRY MACK,
A Professional Law Corporation

BY: 
DONALD E. SMITH

DES:jar

cc: Susan Marx
Minna Maryanov
Lt. Michael McCabe
Darryl A. De Cuir, Esq.
Neil G. McNiece, Esq.