



California Fair Political Practices Commission

October 21, 1988

Adrian Kuyper
County Counsel
County of Orange
10 Civic Center Plaza
P.O. Box 1379
Santa Ana, CA 93703-1379

Re: Your Request for Advice
Our File No. A-88-348

Dear Mr. Kuyper:

This letter is in response to your request for advice regarding the duties of Mr. Concannon, Mr. Thomas and Mr. Heim, members of the Board of Retirement of the Orange County Employees Retirement System under the conflict-of-interest provisions of the Political Reform Act (the "Act").^{1/}

QUESTION

May these members of the Board of Retirement, who are also retired county employees, vote on a cost-of-living increase for retirees?

CONCLUSION

A public official is not prohibited by the Act from participating in decisions affecting salary the official receives from a state or local government agency. Retirement benefits are considered a part of the compensation for employment, or "salary", under the Act. Therefore, a public official may participate in decisions affecting his or her retirement benefits received upon retirement from a state or local government agency.

^{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.

FACTS

The Orange County Employees Retirement System (OCERS) is a public retirement system operating under the County Employees Retirement Law of 1937. OCERS provides pension benefits to retired employees of the County of Orange. OCERS is governed by a nine-member Board of Retirement, which currently includes three members who are retired employees of the County of Orange, Mr. Concannon, Mr. Thomas and Mr. Heim. All three are receiving retirement benefits from OCERS.

One of the responsibilities of the board is to determine, on an annual basis, whether there has been an increase in the cost-of-living for the local area. If there has been an increase in the cost-of-living, then all retirement allowances of persons retired as of April 1 of the year in question are increased by an amount corresponding to such increase, not to exceed three percent (3%).

Mr. Concannon, Mr. Thomas and Mr. Heim would personally benefit from an increase in the retirement allowances for all retirees.

ANALYSIS

Section 87100 provides that no public official shall make, participate in making or in any way attempt to use his or her official position to influence a governmental decision in which the official knows, or has reason to know, he or she has a financial interest.

Section 87103 defines "financial interest" in a governmental decision where it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official or any source of income aggregating \$250 or more within twelve months prior to the time when the decision is made. (Section 87103(c).)

As a member of the board of retirement, all members of the board are public officials. (Section 82048.) Thus, board members must refrain from participating in governmental decisions which could foreseeably have a material financial effect on themselves or a source of income to them.

"Income" is defined in the Act to include "salary." (Section 82030.) However, excepted from the definition of income is "salary ... received from a state, local or federal government agency...." (Section 82030(b)(2).) Consequently, a

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salary received from a public agency is not considered income for purposes of the conflict-of-interest provisions of the Act.

With that in mind, I direct your attention to the Commission's opinion in In re Moore (1977) 3 FPPC Ops. 33 (copy enclosed), which you reference in your letter of request. Although the specific facts of that situation was not identical to the present set of facts, it involved a county retirement board and the question of whether retirees serving on the board may participate in decisions which could affect their own retirement benefits.

The Commission looked to California Supreme Court cases which hold that retirement benefits "are part of the consideration earned by the employee ..." and that "the pension payment serves as a remuneration for services rendered by the employee...." (Moore, supra, at p. 36, citing Waite v. Waite (1972) 6 Cal. 3d 461, 469.) The Commission concluded that a pension is a type of "deferred salary", and therefore, is included in the definition of income as used in Section 82030. The Commission held, however, that where the source of the pension or retirement benefit is from a local government agency, it is excluded from the definition of income by the exception in Section 82030(b)(2).

You have expressed concern that you can no longer rely on the holding in Moore because of the 1986 amendment to Section 87103. This amendment added "material financial effect...on the official" to the definition of financial interest in a governmental decision. Therefore, because the retirement board decisions regarding cost-of-living increases will have a financial effect on the officials, it can be argued that the holding in Moore is inapplicable, and the retired members of the board must disqualify themselves from participation in those decisions.

You are correct in your analysis that the 1986 amendment to Section 87103 added foreseeable material financial effect on the public official's personal expenses, income, assets, or liabilities as a basis for a conflict of interest. It is also true that the law was amended after the Moore opinion was published. However, the holding in Moore, supra, is still applicable for the principle that retirement benefits constitute "salary" for the purposes of the Act and Section 82030(b)(2) still excludes salary from a local government agency from the definition of income. Moreover, as we noted in previous correspondence, Regulation 18702.1(c) clearly provides that an official does not have to disqualify himself or herself from a governmental decision if:

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(2) The decision only affects the salary, per diem, or reimbursement for expenses the official or his or her spouse receives from a state or local government agency.

Regulation 18702.1(c).
[Emphasis added.]

We conclude, therefore, that the retired members of the retirement board may participate in decisions involving cost-of-living increases for beneficiaries.

If you have any questions regarding this analysis, please contact me at (916) 322-5901.

Sincerely,

Diane M. Griffiths
General Counsel



By: Lilly Spitz
Counsel, Legal Division

DMG:LS:plh

Enclosure



Writer's Direct Dial Number
834-3357

7147

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ASSISTANTS

August 31, 1988

File Nos. P-297
R-500

VICTOR T. BELLERUE	DAVID BEALES
JOHN R. GRISET	TERRY C. ANDRUS
EDWARD N. DURAN	JAMES L. TURNER
IRYNE C. BLACK	PETER L. COHON
RICHARD D. OVIEDO	NICHOLAS S. CHRISOS
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JAMES F. MEADE	KATHY PAUL
STEFEN H. WEISS	KAREN R. PRATHER
SUSAN STROM	F. LATIMER GOULD

DEPUTIES

Mr. Gregory W. Baugher
Executive Director
Fair Political Practices Commission
428 J Street, Suite 800
P.O. Box 807
Sacramento, California 95804

Re: Your File No. 88-003; Request of
Orange County Employees Retirement
System for FPPC Opinion

Dear Mr. Baugher:

This is in response to your letter dated August 11, 1988. In that letter, you indicate that our request for a legal opinion (dated August 1, 1988) has been denied, and that Commission Regulation 18702.1(c)(2) applies to the facts outlined in our opinion request. You have also indicated that upon request, your staff will prepare an advice letter which would provide an analysis of Regulation 18702.1(c) and its application to the facts presented in our opinion request of August 1, 1988.

By this letter, I am requesting that your staff prepare such an advice letter. The reasons for this request are as follows:

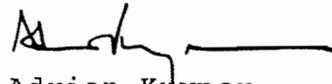
Regulation 18702(c)(2) states that a public official is not disqualified from participating in a governmental decision which "affects the salary, per diem, or reimbursement for expenses the official or his or her spouse receives from a state or local government agency." In the factual situation presented in our August 1, 1988 opinion request letter, we noted that the governmental decision in question would lead to an increase in retirement benefits for the retirees participating in the decision. Regulation 18702.1(c)(2) specifically mentions "salary," "per diem," and "reimbursement for expenses," but makes no mention of "retirement benefits." It could be argued that a retirement

Mr. Bauger
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benefit is similar to a salary payment, in that retirement benefits are a form of deferred compensation for services. However, the fact remains that Regulation 18702.1(c)(2) makes no specific mention of retirement benefits. In light of the statutory mandate that the provisions of the Political Reform Act should be liberally construed to accomplish the purposes of the Act (Govt. Code Sec. 81003), we are somewhat reluctant to extend Regulation 18702.1(c)(2) to include retirement benefits, when the regulation makes no mention of such benefits. However, an advice letter from FPPC staff, which specifically addresses this issue, could be of assistance in resolving this matter.

Thank you for your consideration of this request.

Very truly yours,


Adrian Kuyper
County Counsel

DHR:bv
cc: Diane Griffiths
General Counsel, FPPC

Board of Retirement
Orange County Employees Retirement System



OFFICES OF
THE COUNTY COUNSEL
COUNTY OF ORANGE

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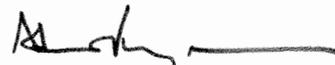
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Thank you for your consideration of this request.

Very truly yours,



Adrian Kuyper
County Counsel

DHR:bv

cc: Diane Griffiths
General Counsel, FPPC

Board of Retirement
Orange County Employees Retirement System



California Fair Political Practices Commission

September 7, 1988

Adrian Kuyper
Orange County Counsel
P.O. Box 1379
Santa Ana, CA 92702-1379

Re: 88-348

Dear Mr. Kuyper:

Your letter requesting advice under the Political Reform Act was received on September 6, 1988 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact Lilly Spitz, 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. Code of Regs. 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,

Kathryn E. Donovan
Diane M. Griffiths
General Counsel *for*

DMG:plh