



California
Fair Political
Practices Commission

SUPERSEDED
by 18702.1(a)(4)

May 18, 1989

Patrick J. Sampson
City Attorney of the City of Pomona
City Hall
505 Garey Ave.
Pomona, CA 91769

Re: Your Request for Informal Assistance
Our File No. I-89-196

Dear Mr. Sampson:

You have requested advice concerning the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ You are requesting advice about another person's duties under the Act based upon your duty, as city attorney, to advise rather than upon specific authorization. Therefore, we are treating your request as one for informal assistance pursuant to Regulation 18329(c) (copy enclosed).²

QUESTIONS

1. May the councilman participate in the direction of a case in which he is a plaintiff and the city is a defendant by voting to abandon the city's appeal, concede the plaintiffs' case, or do any act in furtherance of the plaintiffs' position and in detriment of the city's position?

2. May the councilman vote to place the district election issue on the ballot?

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.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Government Code Section 83114; 2 Cal. Code of Regs. Section 18329(c)(3).)

3. What are the sanctions for violating the Political Reform Act in conflict-of-interest cases?

4. Does Section 91002 apply to sitting officers or only candidates?

CONCLUSIONS

1. The councilman may not participate in any decisions involving the case if the decision is likely to result in the personal expenses, income, assets or liabilities of the councilman or his immediate family increasing or decreasing by at least \$250.

2. The decision to place the issue of district elections on the ballot is a governmental decision which would also be subject to the same conflict-of-interest test set forth above.

3. Violation of the conflict-of-interest provisions of the Act subjects the violator to administrative, civil and criminal penalties.

4. Section 91002 applies to any person who is convicted of a misdemeanor for violating the Act, including candidates and sitting officers.

FACTS

In 1985 certain minority residents of Pomona filed a federal voting rights case. The suit requested injunctive relief to compel the city to hold district, as opposed to city-wide elections. The plaintiffs also sought attorney's fees and costs. In 1986, the case was tried and judgment was entered against plaintiffs. The city made a motion for attorney's fees and costs which was denied in part. Both parties have appealed, and the matter is now pending in the 9th Circuit Court of Appeals.

In April 1989 one of the plaintiffs in the lawsuit took office as a Pomona councilman. The plaintiffs have requested attorney's fees if they win the case, and their attorneys have requested attorney's fees in other pending cases mooted by a district election charter change adopted through a council-initiated electoral measure.

Under the councilman's retainer agreement, it does not appear that he would be personally liable for his attorney's fees if plaintiffs lose. However, he would be liable for the city's attorney's fees and costs if the city's appeal is sustained and the trial court grants such an award. You believe this is a fairly unlikely scenario. Furthermore, it is the opinion of the city's attorney that if the council puts the district election issue on the city ballot, and if the electorate votes to change the system of elections, the case would be mooted. As such, the

city's motion for fees would also be mooted, and plaintiffs' attorneys will collect very high attorney's fees.

ANALYSIS

Section 87100 prohibits public officials from making, participating in, or using their official position to influence any governmental decision in which they know or have reason to know they have a financial interest. An official makes a governmental decision when he votes, commits his agency to a course of action, enters into a contract, or appoints someone. (Regulation 18700(b), copy enclosed.)

As a member of the city council, the councilman is a public official. (Section 82048.) He will be making governmental decisions if he votes to abandon the appeal, concede the case, or take any other action regarding the lawsuit. The same would be true of a vote to place the district election on the ballot. The members of the city council are making a governmental decision when they decide whether to place an item on the ballot. (Scher Advice Letter, No. A-88-479, copy enclosed.) Therefore, the councilman cannot participate in those decisions if he knows or has reason to know that he has a financial interest in them. (Section 87100.)

An official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from the effect on the public generally, on the official or any member of his or her immediate family. (Section 87103.)

Foreseeability

The effects of a decision are reasonably foreseeable if there is a substantial likelihood that they will occur. To be foreseeable, the effects of a decision must be more than a mere possibility; however, certainty is not required. (Downey Cares v. Downey Development Com. (1987) 196 Cal. App. 3d 983, 989-991; Witt v. Morrow (1977) 70 Cal. App. 3d 817, 822; In re Thorner (1975) 1 FPPC Ops. 198, copy enclosed.) The Act seeks to prevent more than actual conflicts of interest; it seeks to prevent even the appearance of a possible conflict of interest. (Witt v. Morrow, supra at 823.)

You have indicated that a major financial effect of any decisions regarding the lawsuit would be the determination of who is liable for payment of attorney's and costs. According to the information that you have provided, the councilman will not be personally liable for payment of his attorney's fees whether or not plaintiffs win the case. You have also stated that it is possible, but unlikely, that he could be liable for the city's attorney's fees and costs. Therefore, it would appear that the councilman's liability for his own attorney's fees or for the City's attorney's fees and costs is not foreseeable.

There is a possibility that a vote to put the issue of district elections on the ballot could result in a change of election system rendering the case moot. This would likely result in a high award of attorney's fees to the attorneys for the councilman. However, if the councilman is not liable for the fees, he saves nothing by the award. The award would be to the attorneys and not the councilman, and thus would not produce a financial effect on the councilman.

The only financial effect that may involve the councilman would appear to be an award of costs of suit, since it is not clear that his retainer agreement releases him from personal liability for his own costs of suit in addition to attorney's fees. Thus, if the councilman is subject to personal liability for his own costs of litigation depending upon the outcome of the case, this would be a measurable and foreseeable financial effect.

Material Financial Effect

The effect of a decision on a public official is deemed to be material if he is directly involved in the decision and the decision will result in the personal expenses, income, assets or liabilities of the official or his immediate family increasing or decreasing by at least \$250. (Regulation 18702.1(a)(4), copy enclosed.) Thus, if the decision made by the councilman could result in increasing or decreasing his liability for costs by \$250, it would be considered a material financial effect. The councilman would then be precluded from participating in any such decision.

Sanctions

Any person who violates the conflict-of-interest provisions of the Act is subject to a variety of sanctions. As a general rule, the Commission proceeds administratively. The maximum administrative penalty for violating the Act is \$2,000 per violation. (Section 83116.)

There are also civil and criminal penalties pursuant to Sections 91000-91015. For example, anyone who knowingly or willfully violates any provision of the Act is subject to prosecution for a misdemeanor and to a criminal fine of up to the greater of \$10,000 or three times the amount received by the official in violation of the Act. (Section 91000.) Any official who realizes an economic benefit as a result of a violation of Section 87100 is liable in a civil action brought by the civil prosecutor or by a person residing in the jurisdiction for any amount up to three times the value of the benefit. (Section 91005.)

Sanctions for violation of the conflict-of-interest provisions of the Act do not include removal from office. However, any person who is convicted of a misdemeanor under the Act is prohibited from being a candidate for any elective office or from

acting as a lobbyist for a period of four years following the date of the conviction unless the court at the time of sentencing specifically determines that this provision shall not apply. (Section 91002.) This would include candidates, incumbents, or any other person who violates the Act.

It is important to note that this analysis is limited to a conflict determination under the conflict-of-interest provisions of the Act. The Act focuses only on the councilman's economic interests involved in a decision, rather than his beliefs or status as a plaintiff in the case.

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

Sincerely,

Kathryn E. Donovan
General Counsel



By: Margaret W. Ellison
Counsel, Legal Division

KED:MWE:aa

Enclosures

THE CITY OF
POMONA

Office of the City Attorney

11272
MAR 4 1 03 PM '89
PATRICK J. SAMPSON
City Attorney



March 31, 1989

Honorable John M. Larson,
Chairman
FAIR POLITICAL PRACTICES COMMISSION
428 "J" Street, Suite 800
Sacramento, California 95814

RE: REQUEST FOR FORMAL WRITTEN ADVICE

Dear Mr. Larson:

In 1985 certain minority citizens resident in Pomona filed a federal voting rights case. The request was for injunctive relief to compel the City to hold district, as opposed to city-wide elections, plus attorney's fees and costs. In 1986 the case was tried and judgment was entered against plaintiffs. The City made a motion for attorneys fees and costs. Such motion was denied in part - the great bulk of the costs and all of the attorney's fees were denied by the court. Both parties have appealed and the matter is now pending in the 9th Circuit.

In April 1989 one of the plaintiffs in the voting rights lawsuit will take office as a Pomona councilman. The plaintiffs have requested in their complaint attorney's fees if the case is won by them and their attorneys have requested attorney's fees in other pending cases mooted by a district election Charter change adopted through a Council initiated electoral measure. Under the councilman-elect's retainer agreement it seems as if he would not be personally liable for his attorney's fees if the case were lost. However, he would be liable for the City attorney's fees and costs if the City's appeal is sustained and the trial court grants such an award (a fairly unlikely scenario). Furthermore it is the opinion of our attorney in the case that if the Council puts the district election issue on the City ballot, and if the electorate votes the change of elections system, the case would be mooted, the City's motion for fees would also be mooted and the plaintiffs will collect (on behalf of their attorneys) very high attorney's fees.

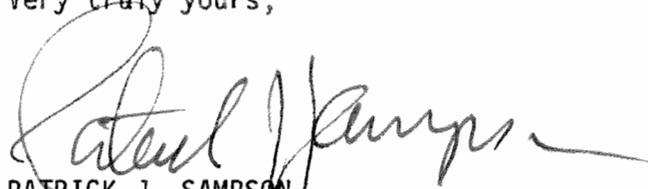
Under these circumstances, may the councilman-elect, when seated, participate in the direction of the case by voting to abandon the appeal, concede the plaintiffs' case, or do any act in furtherance of the plaintiffs' position and in detriment of the City's position and which might negate the City's claim for attorney's fees against him?

Honorable John M. Larson, Chairman
FAIR POLITICAL PRACTICES COMMISSION
March 31, 1989
Page 2

May the councilman-elect vote to place the district election issue on the ballot?

What are the sanctions for violating the Political Reform Act in these instances? Misdemeanor conviction? Removal from office? (Does Section 91002 Government Code apply to sitting holders of elective office who are convicted of a misdemeanor or only candidates?)

Very truly yours,

A handwritten signature in cursive script, appearing to read "Patrick J. Sampson", with a long horizontal flourish extending to the right.

PATRICK J. SAMPSON
City Attorney

PJS:tk



California Fair Political Practices Commission

April 5, 1989

Patrick Sampson
City Attorney
City Hall
505 So. Garey Avenue
Box 660
Pomona, CA 91769

Re: Letter No. 89-196

Dear Mr. Sampson:

Your letter requesting advice under the Political Reform Act was received on April 4, 1989 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact Margaret Ellison 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,

Diane M. Griffiths
Diane M. Griffiths
General Counsel

DMG:plh