



California Fair Political Practices Commission

February 6, 1990

John W. Rosskopf
Chief Counsel
Office of Statewide Health
Planning and Development
1600 - 9th Street, Room 435
Sacramento, CA 95814

Re: Your Request for Advice
Our File No. A-89-709

Dear Mr. Rosskopf:

This is in response to your request for advice regarding whether the Minority Health Professions Education Foundation is an "agency" subject to the provisions of the Political Reform Act ("the Act").¹

QUESTION

Must the Office of Statewide Health Planning and Development amend its conflict of interest code to include reporting and disclosure requirements for the trustees of the Minority Health Professions Education Foundation?

CONCLUSIONS

The Office of Statewide Health Planning and Development must amend its conflict of interest code to include reporting and disclosure requirements for the trustees of the Minority Health Professions Education Foundation.

FACTS

In 1987, the Legislature passed Senate Bill 476 which created the Minority Health Professions Education Foundation (hereinafter "foundation") as a branch of state government. The purpose of this organizational unit of state government was to solicit funds primarily from the private sector. The funds were to be used by

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.

the Office of Statewide Health Planning and Development (hereinafter "office"), a state agency, to provide loans and scholarships to minority health professions students. Senate Bill 476 became Chapter 1307, Statutes of 1987 and added Article 14 (commencing with Section 69795) to Chapter 2 of Part 42 of the Education Code.

In 1988, Senate Bill 2614 amended Education Code Section 69796 to provide that the office "shall establish a nonprofit public benefit corporation, to be known as the Minority Health Professions Education Foundation." This bill eliminated the language that established the foundation as an organizational subdivision of state government.

The foundation has now been organized as a California nonprofit public benefit corporation. The primary purpose of the corporation is to solicit and receive funds to be used by the office for loan and scholarship purposes. Education Code Section 69798 provides that the foundation shall advise the office in the disbursement of scholarship funds and on such technical details as evaluation criteria and application forms. The foundation may also provide advice on which schools should receive financial assistance.

You are chief counsel for the office and the initial incorporator for the foundation, a California nonprofit public benefit corporation. In your capacity as chief counsel for the office, you seek our assistance to determine the duties and responsibilities of members of the board of the foundation under the Act.

ANALYSIS

The Act was adopted by California voters as part of the initiative process in 1974. Among the purposes that the Act expressly sought to accomplish were disclosure by public officials of assets and income that may be affected by their official actions and, in appropriate circumstances, disqualification of the officials from acting so that conflict of interest could be avoided. (Section 81002(c).) To effect these purposes, the Act included a chapter on conflicts of interest² which sets forth disclosure and disqualification requirements for "public officials" serving in decisionmaking positions at various levels of state or local government.

Section 82048 defines "public official" as:

... every member, officer, employee or consultant of a state or local government agency....

² See Chapter 7 of Title 9 of the Government Code (Sections 87100-87500).

The issue posed in your letter is whether the foundation is a "state agency" for purposes of the Act. If it is, then "public officials" of the foundation are subject to the disclosure and disqualification requirements of the Act.

The Act defines "state agency" as follows:

"State agency" means every state office, department, division, bureau, board and commission, and the Legislature.

Section 82050.

The Commission has provided guidelines to assist in the determination of what constitutes a government body. In In re Siegel (1977) 3 FPPC Ops. 62 (copy enclosed), the Commission set forth four criteria by which it determined whether an entity was public or private under the Act. These criteria have been consistently applied by the Commission in its determination of this question. (See In re Leach (1978) 4 FPPC Ops.. 48; Albuquerque Advice Letter, A-88-422; Francis Advice Letter, A-86-214; Hopkins Advice Letter, A-81-38, copies enclosed.) Accordingly, we now apply these criteria in an attempt to determine whether the foundation is a state board or commission under the Act.

The first criterion is whether the impetus for formation of the foundation originated with a governmental agency. This was undoubtedly the case in the formation of the foundation. The foundation was created by the Legislature in 1987 as a branch of state government. The Legislature then changed its status to that of a nonprofit public benefit corporation. Moreover, the statutory scheme provides that the office shall establish the foundation. You, as chief counsel for the office, a state agency, acted as the incorporator for the foundation.

Additionally, the foundation is governed by a board consisting of nine members appointed by the Governor, one member appointed by the Speaker of the Assembly, and one member appointed by the Senate Committee on Rules. (Education Code Section 69796(a).) The chairperson of the State Health Manpower Policy Commission is a nonvoting, ex officio member of the board. (Education Code Section 69796(a)). The director of the office has the power to appoint a council of advisers comprised of up to nine members to advise the director and the board on technical matters. (Education Code Section 69796(c).)

Clearly, the first criterion is met since the foundation was created by the California Legislature, its board members are appointed by elected officials, and it functions as an advisory body to a state agency.

The second criterion is whether the foundation is substantially funded by, or its primary source of funds is, a government agency. The legislature appropriated the sum of one million two hundred thousand dollars (\$1,200,000) for the benefit of the office. The funds are to be allocated to further the purposes of the foundation. (See Senate Bill 2614, Section 6, Chapter 1097 of Stats. 1988, Education Code Sections 69795 and 69800.)

The funds are to be used for scholarships and loans to students from underrepresented minority groups. The funds are also to be used to pay for purposes of furthering the program and for the cost of administering the program. (Education Code Section 69800.) Members of the board and members of the council serve without compensation. However, they are reimbursed for expenses incurred in connection with their duties.

Though the foundation will seek private contributions to implement its programs, we believe that the foundation nevertheless meets the second criterion set forth in the Siegel Opinion. This is so because the Legislature appropriated funds to cover the foundation's administrative expenses. Since the foundation has no other funds at the present time, the state is the primary source of funding for the foundation. Additionally, all funds received by the foundation from private sources will be disbursed through the office after transfer to the Minority Health Professions Education Fund.

The third criterion is whether one of the principal purposes for formation of the foundation is to provide services or undertake obligations which public agencies are legally and traditionally authorized to perform. The purpose of the foundation, as stated in article two of its articles of incorporation, is to solicit and receive funds from the private sector and use the funds to further the health education of minority students who agree to practice their professions in medically underserved areas of the State of California. Education and health services are without question obligations that public agencies have been legally and traditionally authorized to perform. Senate Bill 476, Section 1(a) of Chapter 1307 of Stats. 1987, which created the foundation, sets forth the legislative finding that creation of the foundation is necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the California Constitution. Due to the critical shortage of qualified health professionals in health manpower shortage areas, the act was passed as an emergency statute. On these grounds, we conclude that the Foundation meets the third criterion of the Siegel Opinion.

The final criterion, whether the corporation is treated as a public entity by other statutory provisions, is problematic. The foundation appears to be purely a public benefit corporation formulated under the nonprofit public benefit corporation law set forth at Corporations Code Section 5110 et seq. While such a

corporation is tax exempt like a government entity, there appears to be nothing else which would demonstrate that these types of corporations are treated the same as public entities by other statutory provisions.

However, we do not believe that the foundation's failure to meet the fourth criterion exempts it from treatment as a local government agency under the Act. The foundation has been formed, is substantially funded, and pursues goals established by the Legislature and the State. Its activities will lead to the provision of health services in underserved areas and the training of minority students in the health professions, which are traditionally government functions. The foundation will solicit and receive funds and will present recommendations to a state agency for disbursement of the funds. Members of the board of the foundation may include persons employed as health professionals and other appropriate members of health or related professions. (Education Code Section 69796(a).) The funds will be disbursed to institutions which further the health professions. Given these factors, we believe that opportunities for the types of conflicts of interest anticipated by the Act very well could arise.

In such a case, the Commission has an obligation to ensure that the foundation's officers, employees, and other members "shall perform their duties in an impartial manner, free from bias caused by their own financial interests...." (Section 81001(a); In re Vonk (1981) 6 FPPC Ops. 1, copy enclosed.)

We thus conclude that the foundation is a state agency under the Act and the activities of its officers, employees, and other members are subject to the Act's financial disclosure requirements and should be incorporated in the conflict of interest code for the Office of Statewide Health Planning and Development.

The conflict of interest code must contain a listing of the positions within the foundation which involve the making or participation in the making of decisions which may foreseeably have a material effect on any financial interest. (Section 87302(a).) For each of these positions, the code must list the specific types of investments, business positions, interests in real property, and sources of income which are reportable. (Ibid.) Investments, business positions, interests in real property or sources of income are reportable if they may foreseeably be affected materially by any decision made or participated in by the designated employee by virtue of his or her position. (Ibid.)

For purposes of Section 87302(a), a designated employee participates in the making of governmental decisions 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 decisionmaker, 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.

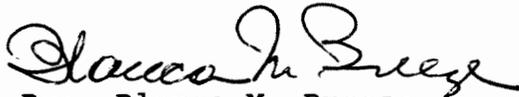
Regulation 18700(c), copy enclosed.

Members of the board of the foundation will make recommendations to the office about the disbursement of scholarship funds and the allocation of funds to schools which will receive financial assistance. They will also prepare or present reports, analyses or opinions, orally or in writing, which require the exercise of judgment. The purpose of these reports is to provide guidance to the office in the disbursement of funds. The reports will thus influence any decisions made with regards to these funds. Thus, members of the board of the foundation will be participating in the making of governmental decisions and are subject to the reporting provisions of the Act.

Should you have any questions or comments regarding this matter, do not hesitate to contact me at (916) 322-5901. For assistance in the revision of your agency's conflict of interest code you may contact Jeanette Turvill, Political Consultant, at the same number.

Sincerely,

Kathryn E. Donovan
General Counsel



By: Blanca M. Breeze
Counsel, Legal Division

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Enclosures