

February 21, 2013

Blaise J. Jackson
General Counsel
Law Offices of Jeffrey G. Scott
16935 West Bernardo Drive, Suite 170
San Diego, CA 92127

Re: Your Request for Advice
Our File No. A-13-010

Dear Mr. Jackson:

This letter responds to your request for advice on behalf of members of the Palo Verde Healthcare District Board regarding the conflict-of-interest provisions of the Political Reform Act (the “Act”).¹ Please note that the Commission does not provide advice relating to past conduct. (Regulation 18329(b)(8)(A), enclosed.) Therefore, any conclusions contained herein apply only to prospective actions. We only advise on the Act, and we do not offer any advice regarding other laws, including Government Code Section 1090.

QUESTION

Do the board members have disqualifying conflicts of interest in upcoming board decisions as explained below?

CONCLUSION

See below for conclusions regarding individual board members.

FACTS

You are General Counsel for the Palo Verde Healthcare District (“PVHD”). PVHD is overseen by a board of five members, two of whom were elected in the 2012 election. The Board will have before it several decisions regarding the Palo Verde Hospital’s operations and a

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

particular doctor. This account of the facts is based on your first request for advice, your current request for advice, and several telephone conversations with you and the board members.

Initially, we received a request for advice from you in January 2013 describing upcoming decisions that the PVHD would face. While we were analyzing that request, the Board held a meeting during which several members voted on issues that related to those in your request.

Following that meeting, a formal complaint was filed with the FPPC's enforcement division. We informed you that the FPPC cannot issue advice on past conduct or on actions currently the subject of an enforcement complaint.

Your current request, according to your assurances, addresses only those decisions on which the Board has yet to vote.

The remaining matters in your request concern a surgeon who contracts with Palo Verde Hospital. Dr. Hossain Sahlolbei is currently a defendant in a lawsuit with the hospital. The Board will make decisions regarding the direction of this litigation. Dr. Sahlolbei is also a plaintiff in a lawsuit against PVHD, which was filed to prevent the Board from entering into an exclusivity contract with a surgical group. There is currently a preliminary injunction in place while that litigation proceeds.

Other decisions before the board will address whether the Board will renew Dr. Sahlolbei's staff privileges when they expire in 2013. Dr. Sahlolbei has an existing contract with the hospital to provide on-call services. Dr. Sahlolbei also serves as chairperson for the hospital's medical staff. You have provided limited information regarding potential economic interests for four of the board members.

Dr. Sahlolbei has, in the past year:

(1) Made a \$1,000 donation to a church at which Board Member Samuel Burton is a minister. Board Member Burton receives a weekly salary from the church for services rendered. His payment amount is contractual and not based on donations to the church.

(2) The doctor is also vocal in his preference for Board Member Sartin's patient transport company, though each practitioner decides on his or her own whether to transport a patient and with what transport company.

(3) Dr. Sahlolbei rented a house co-owned by Board Member Sandra Hudson's husband and his niece. Because the niece moved out of the area, Dr. Sahlolbei paid rent directly to Board Member Hudson, who applied the rent payment to the expenses (including the mortgage) on the house. Until September of 2012, Board Member Hudson collected rent payments from Dr. Sahlolbei for her niece's property. She does not profit from this arrangement as all proceeds are applied to expenses.

ANALYSIS

The Act's conflict-of-interest rules prohibit a public official from making, participating in making, or using his or her official position in any way to influence a governmental decision in which the official knows, or has reason to know, that he or she has a "financial interest." (Section 87100.) Section 87103 provides that a public official has a "financial interest" in a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any of the official's economic interests.

Under the Act, a conflict of interest exists only when a public official has a financial interest in a particular governmental decision. To determine whether a public official has a "conflict of interest" in a specific governmental decision, we employ a standard eight-step analysis outlined in Regulation 18700(b).

You have stated that there are several governmental decisions coming before the PVHD Board and that the members are public officials under the Act. We therefore begin at Step 3 of the eight-step analysis.

Step 3: What are the Board Members' Economic Interests?

A public official has a financial interest in a decision within the meaning of Section 87103 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any one of five enumerated economic interests. (Section 87103; Regulations 18703-18703.5.)

The applicable economic interests include:

- An interest in a business entity in which a public official has a direct or indirect investment of \$2,000 or more. (Section 87103(a), Regulation 18703.1(a).)
- An interest in any business entity in which a public official is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d), Regulation 18703.1(b).)
- An interest in real property in which a public official has a direct or indirect interest of \$2,000 or more. (Section 87103(b), Regulation 18703.2.)
- Any source of income, including promised income, to the public official that aggregates to \$500 or more within 12 months prior to the decision. (Section 87103(c), Regulation 18703.3.)
- Any source of gifts to the public official if the gifts aggregate to \$440 or more within 12 months prior to the decision. (Section 87103(e), Regulation 18703.4.)
- A public official also has an economic interest in his or her personal expenses, income, assets, or liabilities, as well as those of his or her immediate family. This is also known as the "personal financial effects" rule. (Section 87103, Regulation 18703.5.)

Trina Sartin: Boardmember Sartin has an economic interest in each of the transport companies as a business entity. She also has an economic interest in any client of either company from which the business receives \$500 or more in a calendar year.

Sandra Hudson: The Act defines an economic interest in real property to include interests “owned directly, indirectly, or beneficially by the public official, or other filer, or his or her immediate family . . .” For purposes of Section 87103, indirect interest means any interest in real property owned by the spouse or dependent child of a public official, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official’s agents, spouse, and dependent children own directly, indirectly, or beneficially a 10-percent interest or greater. Boardmember Hudson has an economic interest in the property that her husband owns with his niece.

A public official also has an economic interest in: “[a]ny source of income, including promised income, to the public official that aggregates to \$500 or more within 12 months prior to the decision. (Section 87103(c), Regulation 18703.3.) We have consistently found that, absent an explicit separate-property agreement, a public official has a reportable interest in her spouse’s sources of income. (See, e.g. *Marks* Advice Letter, A-08-190.)

Until September 2012,² Boardmember Hudson collected rent from the property that her husband and his niece co-own. The rent checks were made payable to Boardmember Hudson and totaled more than \$500. Dr. Sahlolbei was the tenant paying rent until January 2013. While you state that the rent payments were collected on behalf of the niece, you also stated that they were used to pay the mortgage and other expenses related to the property that the Boardmember’s husband co-owns. Boardmember Hudson therefore has an economic interest in Dr. Sahlolbei as a source of income if her community property share of the income was greater than \$500 in the 12 months before a decision.

Sam Burton: Boardmember Burton has an economic interest in the income he receives from the Methodist church. You stated his salary is paid weekly and is contingent on no other factor than services rendered. Under these facts, we do not consider people making contributions to the church sources of income to Boardmember Burton.

Beatrice Pinon: Boardmember Pinon has a source of income economic interest in Blythe Ambulance. She also has an economic interest in Blythe Ambulance as a business entity. (Section 87103(d), Regulation 18703.1(b).)

In addition to having an economic interest in the business entity as a source of income, an official also has a source of income economic interest in “any individual owning a 50 percent or greater interest in that business entity [and] any individual, regardless of the extent of the

² It is unclear to whom payments were made after September, 2012. The Act has a 12-month “look back” provision when determining income, meaning that, when making decisions, the public official looks at the income received in the last 12 months (rather than in a calendar year or reporting period).

individual's ownership interest in that entity, who has the power to direct or cause the direction of the management and policies of that business entity." (Regulation 18703.3(a)(3).)

Step 4: Will the Board Members' economic interests be directly or indirectly involved in decisions each will make, participate in making, or influence as a public official?

Regulation 18704.1 provides that a person, including a business entity, is directly involved in a decision before an official's agency when that person, either directly or by an agent, initiates the proceeding in which the decision will be made, is a named party, or is the subject of the proceeding concerning the decision before the official or the official's agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person. (Regulation 18704.1(a)(2).)

Regulation 18704.2 states that real property is directly involved in a governmental decision if it is within 500 feet of the boundaries of the subject of the decision or if the property is the subject of the decision. (See Regulation 18704.2(a).)

The decisions you outlined in your letter are as follows:

- 1) *Decisions regarding direction of lawsuits – an injunction filed by medical staff to block exclusive contracts for surgeons and air transport services and a lawsuit between PVHD and Dr. Sahlolbei.*
- 2) *Decisions regarding whether to approve or deny a recommendation on whether to extend PVHD's contract with Dr. Sahlolbei.*
- 3) *Decisions regarding the direction of a lawsuit filed by PVHD against Dr. Sahlolbei as sole defendant.*

Trina Sartin: Neither the air transport company nor the ground transport company has initiated the proceedings in question, nor are they named or a subject of the decisions. Boardmember Sartin's economic interests are indirectly involved. (See Regulation 18704(a).)

Sandra Hudson: Dr. Sahlolbei is a named party to both lawsuits and is the subject of the proceeding regarding his contract. Boardmember Hudson's economic interest in this source of income is therefore directly involved.

The real property her husband owns and in which she has an interest is not the subject of the lawsuits or the contract negotiation and are indirectly involved in the decisions.

Sam Burton: Boardmember Burton's economic interest, the Methodist church as a source of income, is neither named in nor the subject of any governmental decision. It is therefore indirectly involved.

Beatrice Pinon: Boardmember Pinon is an employee of Blythe Ambulance, which provides ground transport services for the hospital. Blythe Ambulance is neither named nor the subject of the decision and is indirectly involved.

Steps 5 and 6: What is the applicable materiality standard to each economic interest and is it reasonably foreseeable that they will be met?

Trina Sartin and Beatrice Pinon.

Business Entities and Sources of income: The materiality standard for a business entity or source of income that is indirectly involved in a governmental decision can be found in Regulation 18705.1. Without facts regarding the gross revenue for these businesses, we cannot state with certainty whether the materiality standard would be met.

For sake of analysis, we apply Regulation 18705.1(c)(4) (copy enclosed), to business entities that are not listed on a public stock exchange, or who have a net income of less than \$750,000. For these entities, the materiality standard is met if it is reasonably foreseeable that:

“(A) The governmental decision will result in an increase or decrease in the business entity's gross revenues for a fiscal year in the amount of \$ 20,000 or more; or,

(B) The governmental decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$5,000 or more; or,

(C) The governmental decision will result in an increase or decrease in the value of the business entity's assets or liabilities of \$ 20,000 or more.”

By applying this information to the transport companies' fiscal situation, you will be able to determine whether the materiality standard has been met.

Conclusion: Based on your facts, it does not appear reasonably foreseeable that the decisions regarding the lawsuits or Dr. Sahlolbei's contract will meet the above standards with respect to either Boardmember Sartin's or Boardmember Pinon's interests in business entities as sources of income. Therefore these Boardmembers do not have disqualifying conflicts of interest.

Sandra Hudson.

Source of Income: “[a]ny reasonably foreseeable financial effect on a person who is a source of income to a public official and who is directly involved in a decision before the official's agency is deemed material.” (Regulation 18705.3(a).) Dr. Sahlolbei is directly involved in each decision; Boardmember Hudson's interest is deemed material. Additionally, it

is reasonably foreseeable that the decisions before PVHD will have a material effect on Dr. Sahlolbei.

Real Property: The financial effect on a real property interest that is indirectly involved is presumed not to be material. (Regulation 18705.2(b).) You have not provided us any facts to rebut that presumption. Therefore, the real property in which Boardmember Hudson has an economic interest is presumed not material.

Conclusion: Based on the above, Boardmember Hudson has a disqualifying conflict of interest in the decisions under Regulation 18705.3 (a).

Sam Burton.

Nonprofit Source of Income: When a non-profit entity that is a source of income to a public official is indirectly involved in a governmental decision, the appropriate materiality standard is found in Regulation 18705.3(b)(2). The particular materiality standard to apply depends on the size of the non-profit entity. We do not have information regarding the income of the Methodist Church. Given the decisions at issue, however, we assume that none of the material standards in Regulation 18705.3(b)(2) apply. It is therefore not reasonably foreseeable that the decisions will have a material effect on Boardmember Burton's interest.

Conclusion: Boardmember Burton does not have a disqualifying conflict of interest in the listed decisions.

Steps 7 & 8: Does any exception apply?

Two exceptions apply to the standard eight-step analysis in cases where it is reasonably foreseeable that a materiality standard will be met as per a given public official. There are no facts to determine whether the public official's economic interest will be affected in the same way as the public generally. The other exception allows a public official to participate in a decision if it is "legally required." (Section 87101.)

In the case where a public official is otherwise disqualified to participate in a governmental decision, he or she may participate if the participation is legally required. (Section 87101; Regulation 18708.) This exception is narrowly construed and applies only when it is legally impossible for the decision to be made without the participation of a disqualified official, and where there is no "alternative source of decision consistent with the purposes and terms of the statute authorizing the decision." Typically, this exception is invoked when, due to disqualification, an agency is unable to convene a "quorum" of its members.

For example, if three members of a five member board constituted a quorum, and if three members have conflicts of interest under the Act, there is no quorum and the rule would apply. Accordingly, the three disqualified officials could participate in a random selection process to choose which one official may participate in the decision in order to create a quorum. (*In re Hudson* (1978) 4 FPPC Ops. 13.)

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

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HMR:jgl

Enclosure