

July 22, 2013

Linda A. Cantillon
2564 Darroch Court
Napa, CA 94558

Re: Your Request for Formal Advice
Our File No. A-13-096

Dear Ms. Cantillon:

This letter responds to your request for advice regarding your duties as a Napa Civil Service Commissioner under the conflict-of-interest provisions of the Political Reform Act (the “Act”).¹ This letter is based solely on the facts presented. The Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Please note that our advice is based solely on the provisions of the Act, we therefore offer no opinion on the application, if any, of other conflict-of-interest laws, such as Government Code Section 1090 or common law conflict of interest. We suggest that you consult with the City Attorney on these and other possibly applicable issues not governed by the Act.

QUESTIONS

1. Do you have a conflict of interest in your decisions as a member of the Napa Civil Service Commission due to the fact that your husband works as a paid employee of a law firm as the designated labor representative for seven employee groups whose members sometimes appear before your Commission?

2. Would you still have the same conflict of interest if your spouse’s employer referred the case to a different law firm?

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.

CONCLUSIONS

1. You will have a conflict of interest in decisions that will have a foreseeable material financial effect on the law firm, either directly or indirectly as discussed below.

2. If the decision will have no financial effect on your spouse's law firm/employer, or any other of your interests, you will not have a conflict of interest.

FACTS

You are currently serving as a Civil Service Commissioner for the City of Napa. The Commission is a noncompensated body with five members whose task it is to act in an administrative capacity to the City Council on problems concerning personnel administration. Two of the commissioners are appointed by the City Council, two of them are elected by the employees, and the fifth is selected as an at large representative by the other four sitting commissioners. You are a commissioner elected by employees. The commissioners are confronted with decisions such as:

- The appointment and evaluation of the City's Personnel Director.
- Making, amending, recommending, and repealing rules and regulations for city employees.
- Hear/certify findings of classified service personnel appeals (you hear appeals as to whether or not the testing and appointing process was administered fairly by the personnel department as well as appeals of discipline).
- Make recommendations to city council on adoption or revision of classification and/or specifications position/ plan.
- Recommend to city council salaries and ranges for new classification in the classified service.

On July 9, 2013, you provided the following additional information.

- Your spouse has no ownership interest or investment interest in his employer.
- Your spouse's income is a fixed salary of \$4,250 per month and he is the designated labor representative for seven employee groups. He does not receive any bonuses or contingency payments in connection with his employment.

ANALYSIS

The primary purpose of the Act's conflict-of-interest provisions is to ensure that "public officials, whether elected or appointed, perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them." (Section 81001(b).) In furtherance of this goal, Section 87100 of the Act prohibits a public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. Determining whether a conflict of interest exists under Section 87100 is an eight-step process as outlined below.

Steps One and Two: Are you a "public official" making, participating in making, or influencing a governmental decision?

As a "member ... of a ... local government agency" (Napa's Civil Service Commission), you are a public official subject to the Act's conflict-of-interest provisions. (Section 82048; Regulation 18701(a).) Consequently, you may not make, participate in making, or otherwise use your official position to influence any decisions that will have a reasonably foreseeable material financial effect on any of your financial interests.

A public official "makes a governmental decision" when the official, acting within the authority of his or her office or position, votes on a matter, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (See Regulation 18702.1.) A public official "participates in a governmental decision" when, acting within the authority of his or her position and without significant intervening substantive review, the official negotiates, advises or makes recommendations to the decision maker regarding the governmental decision. (Regulation 18702.2.) A public official is attempting to use his or her official position to influence a decision if, for the purpose of influencing, the official contacts or appears before any member, officer, employee, or consultant of his or her agency. (Regulation 18702.3.)

You seek to be able to make and participate in decisions of the civil service commission that may impact your spouse's employer.

Step Three: What are your interests -- the possible sources of a conflict of interest?

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 interests. Your interests that are pertinent to this question are:

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- A public official has an interest in any source of income, including promised income, which aggregates to \$500 or more within 12 months prior to the decision (Section 87103(c); Regulation 18703.3). “Income” means “a payment received, including but not limited to any salary, wage, advance, dividend, interest, rent, proceeds from any sale, gift, including any gift of food or beverage, loan, forgiveness or payment of indebtedness received by the filer, reimbursement for expenses, per diem, or contribution to an insurance or pension program paid by any person other than an employer, and including any community property interest in the income of a spouse.”²
- A public official has an economic interest in his or her personal finances, including those of his or her immediate family -- this is the “personal financial effects” rule (Section 87103; Regulation 18703.5).

You acknowledged that pursuant to Section 87103(c), you have an interest in your spouse’s employer based on your community property share of your spouse’s income.

Step Four: Are your interests directly or indirectly involved in the governmental decision?

The fourth step in analyzing a potential conflict of interest is to determine whether the public official's economic interest is directly or indirectly involved in the governmental decision at-issue. (Regulation 18700(b)(4).) This step is important because it determines which test for materiality to use in deciding whether it is reasonably foreseeable that the governmental decision will have a material financial effect on the economic interest. Obviously, the application of this step will depend on the specific facts of a particular decision.

A source of income is directly involved in a decision before an official’s agency when that person, either directly or by an agent:

“(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

“(2) Is a named party in, 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).)

For example, if the law firm was an applicant for a contract with your commission, the law firm would be directly involved in the decision. In all cases where the law firm is not directly involved, the law firm would be indirectly involved. (Regulation 18704(a).)

² Section 82030 also provides: “Income of an individual also includes a pro rata share of any income of any business entity or trust in which the individual or spouse owns, directly, indirectly or beneficially, a 10-percent interest or greater.” You noted your spouse has no ownership interest in his employer (the law firm).

The decisions you described in your request all appear to only indirectly involve the law firm. These decisions are: the appointment and evaluation of the City's Personnel Director; making, amending, recommending, and repealing rules and regulations for the classified service; hear/certify findings of classified service personnel appeals; make recommendations to City Council on adoption or revision of classification and/or specifications position/ plan; recommend to City Council salaries and ranges for new classification in the classified service.

With respect to personal finances, Regulation 18704.5 provides that a public official or his or her immediate family are deemed to be directly involved in a governmental decision which has any financial effect on his or her personal finances or those of his or her immediate family. In this case, you stated that your spouse receives a fixed monthly salary that will not be impacted by the decisions of your commission. Based on the facts, your personal finances are not implicated and we do not further discuss personal finances.

Step Five and Six: What is the applicable materiality standard and is it reasonably foreseeable that the materiality standard will be met?

Depending on the conclusion at the fourth step of the analysis, two different materiality standards could apply to decisions affecting the law firm. In cases where the law firm is directly involved, Regulation 18705.1 provides that "the financial effects of a governmental decision on a business entity which is directly involved in the governmental decision is presumed to be material. This presumption may be rebutted by proof that it is not reasonably foreseeable that the governmental decision will have any financial effect on the business entity."

With respect to decisions indirectly affecting the law firm, Regulation 18705.1(c)(4) provides (assuming the law firm is a relatively small business that is not publically traded) that a financial effect is material 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.”

Once a public official has determined the materiality standard applicable to each of his or her interests, the next step is determining whether it is "reasonably foreseeable" that the standard will be met. A material financial effect on an interest need not be certain or even substantially likely to be "reasonably foreseeable," but it must be more than a mere possibility. (Regulation

18706(a); *In re Thorner* (1975) 1 FPPC Ops. 198.) If so, then you will have a conflict of interest and will be prohibited from participating in the decision.

The question of whether financial consequences on a business entity are reasonably foreseeable at the time a governmental decision is made must always depend on the facts of each particular case. (*In re Thorner*, supra.) Thus, we cannot categorically state at this time whether any of the decisions you have identified will or will not have a reasonably foreseeable material financial effect upon the law firm.

You asked whether, assuming there will be a financial effect on the law firm resulting from a decision of your commission, the firm can avoid the financial effect by referring the clients to another law firm. Again, this is a factually specific question, but if in fact at the time of a specific decision, you can demonstrate that the law firm will not be financially affected (due to the referral or other reasons), you will not have a conflict of interest.³ (Regulation 18705(c).)

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

Sincerely,

Zackery P. Morazzini
General Counsel

By: John W. Wallace
Assistant General Counsel
Legal Division

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³ The questions you have presented do not suggest that the “public generally” or “legally required participation” exceptions to the conflict-of-interest rules are applicable to your situation.