

November 22, 2013

Barbara Hannah, Esq.
Retirement Staff Attorney
San Bernardino County
Employees' Retirement Association
348 W. Hospitality Lane, 3rd Floor
San Bernardino, CA 92415-0014

Re: Your Request for Informal Advice
Our File No. I-13-142

Dear Ms. Hannah:

This letter responds to your request for advice regarding conflict-of-interest provisions of the Political Reform Act (the "Act").¹ This letter is based on the facts presented. The Fair Political Practices Commission (the "Commission") does not act as a finder of fact when rendering advice. (*In re: Oglesby* (1975), 1 FPPC Ops. 71.) Please note that all advice is based only on the provisions of the Act. We offer no opinion on the application, if any, of other laws governing the official conduct of government officials, such as Government Code Section 1090, common law conflict of interest, activities incompatible with public employment, or any laws concerning bribery or extortion. Also, the Commission will not advise with respect to past conduct. (Regulation 18329(b)(8)(A).) Therefore, nothing in this letter should be construed to evaluate any conduct that may have already taken place, and any conclusions contained in this letter apply only to prospective actions.

QUESTION

Based on the facts discussed below, may the San Bernardino County Employees' Retirement Association ("SBCERA") Investment Officer participate in governmental decisions that may have financial effects on the 14 external investment managers?

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.

CONCLUSION

Yes. Under the facts, the Investment Officer has no economic interest in the external investment managers in question. Therefore, he or she will not have a conflict of interest under the Act if he or she participates in SBCERA decisions that may have financial effects on the external investment managers.

FACTS

SBCERA is a governmental agency that manages and administers a retirement fund for the County. SBCERA Investment Officers negotiate the terms of SBCERA's investment contracts and advise the SBCERA board regarding decisions on SBCERA's external investment managers.

One such Investment Officer (the 'Officer') solicited SBCERA external investment managers to make contributions to the Patriot's Day Golf Classic, a fundraiser for the Rim High School Tennis Team. The Officer's child plays on the Rim High School Tennis Team. The event raised funds to resurface the Rim High School tennis courts. All checks were made payable to the team, and sent to the team's coach. The checks were deposited in the account of the Rim of the World Unified School District ("District"), which is a government entity. The Rim High School Tennis Team has no separate booster club, and the Officer is a part of no other organization with express or implied responsibility for maintaining the tennis courts.

Fourteen external investment managers donated a total of \$42,000 to the school. These investment managers worked directly with the Officer to plan the event. The event was held on September 11, 2013, and included a golf tournament, as well as a boat ride intended to thank event donors. Approximately twenty-five people (including two SBCERA trustees and the Officer) attended the golf tournament. Approximately forty-five people (including three SBCERA trustees, one SBCERA staff member, and the Officer) attended the boat ride. The Officer prepaid \$2,630.75 of the \$2,700.75 total event costs. The school reimbursed the Officer for \$2,480.55 of those costs. The Officer then remitted all \$2,480.55 to the school district within 30 days. The Officer did not claim tax deductions for any of his payments or reimbursements related to the event.

ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or using his or her official position to influence a governmental decision in which the official has a financial interest. A public official has a financial interest in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on the official or public official's interests as set forth in Section 87103. (Section 87103; Regulation 18700(a).) The Commission has adopted an eight-step standard analysis for deciding whether an individual has a disqualifying conflict of interest in a governmental decision:

Step One: Is the Officer a “public official”?

The Act’s conflict-of-interest provisions apply only to public officials. (Sections 87100, 87103; Regulation 18700(b)(1).) A public official is “every member, officer, employee or consultant of a state or local government agency . . .” (Section 82048.)

Based on the Officer’s job capacity and Form 700 filings, the officer is a public official under the Act.

Step Two: Is the Officer making, participating in making, or influencing a governmental decision?

A public official makes a governmental decision when, acting within the authority of his or her position, the official votes on a matter, appoints a person, obligates or commits his or her agency to any particular course of action, or enters into any contractual agreement on behalf of his or her agency, or determines not to act. (Regulation 18702.1(a).) A public official participates in a governmental decision when, acting within the authority of his or her position, the official negotiates, advises, or makes recommendations to the decisionmaker regarding the governmental decision without substantive research or investigation. (Regulation 18702.2.) A public official uses his or her official position to influence a governmental 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(a).)

The Officer is making, participating in making, or influencing a governmental decision when negotiating the terms of SBCERA’s investment contracts and advising the SBCERA board on decisions regarding SBCERA’s external investment managers.

Step Three: What are the Officer’s interests?

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 effects on the public generally, on the official, a member of his or her immediate family, or on any of the following five enumerated interests:

- An interest in any business entity if the official has a direct or indirect investment worth \$2,000 or more (Section 87103(a); Regulation 18703.1(a)), or if the official is a director, officer, partner, trustee, employee, or holds any position of management in the business entity (Section 87103.1(d); Regulation 18703.1(b)), or if the business entity is a parent or subsidiary of a business entity in which the official meets the aforementioned investment or employment requirements (Section 87103; Regulation 18703.1(c)).
- An interest in real property in which the official has a direct or indirect interest of \$2,000 or more. (Section 87103(b); Regulation 18703.2.)

- An interest in a source of non-gift income or promised income, which aggregates to \$500 or more within the 12 months prior to the governmental decision. (Section 87103(c); Regulation 18703.3.)
- An interest in any donor of, or any intermediary or agent for a donor of gifts that aggregate to a fair market value of \$440 or more within 12 months prior to the governmental decision. (Section 87103(e). Regulation 18703.4.)
- An interest in the official's personal finances or the finances of the official's immediate family. The "personal financial effects" rule finds economic interest where a governmental decision will increase or decrease the personal income, expenses, assets, or liabilities of the official or their immediate family. (Section 87103; Regulation 18703.5.)

You have asked whether the Officer has an interest in the 14 external investment managers as the source of gifts² based on their donation to the fundraiser. Section 82028(a) defines a gift to be "any payment that confers a personal benefit on the recipient, to the extent that consideration of equal or greater value is not received." While donors to the District did not give a gift to the Officer or his son directly, under certain circumstances the Commission has pierced the veil of a corporate and/or nonprofit entity to determine if the donors to the entity are sources of gifts to the official. (See e.g., *Lahr* Advice Letter, No. I-98-298; *Brown* Advice Letter, No. A-97-122; *O'Shea* Advice Letter, No. I-90-593; *Shaw* Advice Letter, No. A-87-045; *Hentschke* Advice Letter, No. A-80-03-069; *In re Nord* (1983) 8 FPPC Ops. 6.) The Commission may do so when it appears that the nonprofit entity is acting as an intermediary for gifts to the official. Specifically, under Regulation 18945(a), when a payment such as a donation is made to an entity and that entity later uses all or part of the donation to make a gift to an official, the source of the donation is also considered the source of the gift, and the entity an intermediary of the gift, under any of the following conditions:

- (1) The entity receives the donation and uses it to make a gift to the official after the donor identifies the official as the intended recipient of the gift.
- (2) The entity solicits the donation with an understanding with the donor that the donation will be used for the sole or primary purpose of making a gift to officials.
- (3) The donation to the entity is solicited by the official and all or part of it is used to make a gift to the official.

While there are certain requisite characteristics of that behavior in the facts provided, we cannot conclude that these payments would constitute a gift to the Officer under the Act. Payments to resurface the tennis court do not adequately confer a personal benefit (see Section 82028(a)) on the Officer or his son. Because there were no gifts made by the investment

² Our analysis is of course limited to the potential economic interests you have identified.

managers under the Act, the Officer cannot have a disqualifying interest in the investment managers as sources of gifts.³

Accordingly, based on the facts provided, the Officer does not have any disqualifying interest in the investment managers. Barring a reasonably foreseeable material financial effect on an interest recognized under the Act, the Officer is not prohibited from taking part in any decisions affecting donors to the Patriot's Day Golf Classic. Because the Officer has no known interest, we do not consider the remainder of the conflict-of-interest analysis. However, it would be advisable to contact your agency's legal counsel with respect to the doctrine of "incompatible activities" and other provisions of law that may apply to your facts.

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

Sincerely,

Zackery P. Morazzini
General Counsel

By: Nicholas Sanders
Legal Intern, Legal Division

NLS:jgl

³ Your facts also indicate that you received reimbursement from the District in the amount of \$2,480.55 for payments you made toward the costs of the District's event. While this may have raised an issue of whether you, in effect, received a gift from the District, we do not view this as bearing on your question of whether you would have a conflict of interest under the Act relating to the investment managers. In addition, even if this payment would, by itself, be a gift from the District, the issue is moot because you reimbursed the District for this cost within 30 days after receipt, thereby nullifying any gift you may have received because of this payment. (See Section 82028(b)(2) and Regulation 18941(c).)