ROGER A. BROWN
Lawyer
38 North Washington Street
Post Office Box 475
Phone (209) 533-7755 Sonora, California 95370 Fax (209) 533-7757

June 3, 2002

Sent by fax to 916-322-6440 ***Original WILL Follow by US Mail***
Chairman Getman and Commissioners Downey, Knox and Swanson
Fair Political Practices Commission
428 J. Street, Suite 450
Sacramento, Ca 95814

RE: ***In re Hanko (O-02-088)***

Dear Madame Chairman and Commissioners:

I am writing to clarify several items appearing in the May 24, 2002 staff memorandum to the Commission on this Opinion Request. I apologize for not getting these comments to you earlier, but I did not receive a copy of the staff memorandum until Thursday, May 30, 2002, and therefore could not provide my comments earlier. I will appear at the Commission hearing on this Opinion Request on Friday, June 7, 2002. In addition, I expect that Director Hanko will appear and testify at the hearing.

The first clarification I wish to make concerns the staff statement of the "Question Presented" as it appears in the Notice and Agenda and in the staff memorandum. The question I posed in the District's request for an opinion was set out in my March 28, 2002, letter. That question is found in the third paragraph on page one of the March 28, request and it states:

> The basic question is whether Director Hanko must be deemed to have received discretionary "bonus" income from persons or entities other than the actual payor (her employer) where: a) the income is not a commission within the meaning of Regulation 18703(c); b) there is no right to the bonus; and c) these "other" persons or entities have no control over whether or how much of a bonus she might receive.

The staff statement of the "Question Presented" (staff memo) and the "issue" (Notice and Agenda) is inaccurate because it asks whether income should be attributed to a "customer of the employer." As we have tried to clarify with the staff, and they have noted in the body of their memo[1],

---

[1] See, i.e. Staff memo, page 3, "Healthcare providers purchase Baxter products through independent speciality wholesale companies with whom the providers conduct orders and purchase transactions. The wholesale companies purchase and resell the Baxter products to these providers. MPHS purchases Baxter products in this manner."

rablaw@goldrush.com ♦ www.lawyers.com/rogerbrownlaw

the claimed "source" of income, MPHS, is **not** Baxter's customer. MPHS purchases Baxter products from an independent, third party wholesaler. That third party wholesaler is the customer of Baxter. Thus, MPHS is not a direct source of income to Director Hanko or to Baxter. MPHS is three steps removed from Director Hanko. We believe this is a significant fact which further dilutes any interest the Commission may have in disqualifying Director Hanko from decisions affecting MPHS. We do not know why the staff characterized the question as if it involved the customer of Director Hanko's employer when they have acknowledged elsewhere that the question really involves the customer of a customer of her employer.

Further, while the District posed a very specific question for the Commission to resolve in this Opinion Request, it suggests a number of related questions which the Commission may also wish to consider. Public officials usually turn to their agency's attorneys for advice on conflict of interest questions. How is a public agency lawyer or a public official to know that someone other than the actual payor is a source of income if the regulation gives no suggestion that we should look beyond the actual payor in any case not involving commission payments? How many steps removed from the actual payor should public officials and their legal advisors be required to look for any possible disqualifying source of income?

In this case, the staff has looked three steps beyond the public official to find a disqualifying source of income. Must we also look beyond the third level to the fourth or fifth level or beyond? Significantly, the *Larson* and *Anaforian* advice letters relied upon by the staff involved direct customers of the public official's employer, while in this matter, MPHS is the customer of a customer of the employer. Accordingly, in the *Hanko Advice Letter*, staff has extended the concept of "source of income" another step beyond what they advised in the previous letters.

Moreover, where the regulation provides the basic rule and a single exception without suggesting any others, is the staff authorized to expand the list of exceptions by advice letter? We believe this is a legislative or rule making exercise better left to the Legislature or the full Commission with all the public input provided for such procedures. Staff may have recognized as much when they stated on the last page of their memorandum, "We further recommend that the Commission direct staff to place this on next year's regulation calendar for further definition and clarification." If the staff has the authority to expand the scope of the term "source of income" by advice letter, then there would be no need for further regulations. If the staff does not have this power, then the Commission should reassert its own authority to interpret the Act and overrule the staff advice.

We also wish to clarify the statement in the staff memo on page 10, first full paragraph, that we concur *the reason* why Director Hanko's discretionary bonus is not a commission is that it is based on the volume of sales. That is only partially correct. In fact, we contend the bonus is not a commission because it is not "received as a result of services rendered as a broker, agent or other salesperson for a specific sale or similar transaction" (Regulation 18703.3(c)(2).). Since Director Hanko is not involved in any direct selling, there are no specific sales which result in any payment to her. Further, since there are regional sales thresholds and the ultimate bonus decision is made annually by Baxter alone, the discretionary bonus income is not a commission.

We also think it is significant that staff has completely failed to address subsection (a) of Regulation 18703.3. That subsection states quite simply:

> A public official has an economic interest in any person ***from whom he/she has received*** income aggregating two hundred fifty dollars ($250) within 12 months prior to the time when the relevant governmental decision is made. For purposes of the Political Reform Act, a public official's income includes income which has been promised to the public official but not ret received by him or her, if he or she has a ***legally enforceable right*** to the promised income. (Emphasis added.)

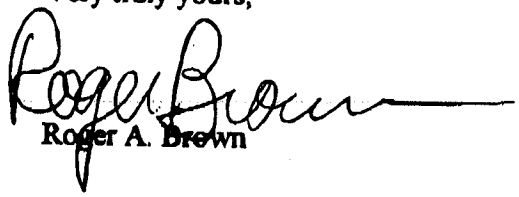
We contend the plain meaning of the first sentence is that the "person from whom he/she has received income" is the actual payor, here Baxter. Further, since Baxter reserves the right to cancel the bonus, there is no "legally enforceable right" for Director Hanko to receive any bonus whatsoever.

The Regulation does not suggest, imply or intimate that there may be other sources of income besides those defined in the Regulation. The only "sources of income" described in the Regulation are the direct payor (the person from whom the payment is received) and, in the limited case of commission income, certain defined persons not relevant here. Nothing in the regulation directs a public official or agency lawyer to look beyond the regulation for a disqualifying "source of income." If the Commission wishes to expand the definition of "source of income" beyond that provided by the Regulation, we contend it should be done by legislation or by regulation, not by staff advice.

While we disagree with other aspects of the staff analysis, we will defer those comments to the Commission hearing on this Opinion Request. Our omission of any such disagreement here, should not be taken as an admission that we concur in any other aspects of the staff analysis.

We look forward to a lively discussion of these very important issues before the Commission.

Very truly yours,



Roger A. Brown

RAB/hs

cc: Colin Coffey

roblaw@goldrush.com ♦ www.lawyers.com/rogerbrownlaw