

82002
82039

BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

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| In the Matter of: |) | |
| |) | |
| Opinion requested by |) | No. 75-042 |
| Carl Leonard |) | April 22, 1976 |
| Special Counsel, |) | |
| San Francisco Bay Area |) | |
| Rapid Transit District |) | |

76-233

BY THE COMMISSION: We have been asked the following questions by Carl A. Leonard, special counsel for the San Francisco Bay Area Rapid Transit District (BART):

(1) Are persons representing the Bay Area Rapid Transit District before the State Public Utilities Commission lobbyists within the meaning of Government Code Section 82039?

(2) Is the safety director of the Bay Area Rapid Transit District a lobbyist because he communicates information to the staff of the Public Utilities Commission as required by a Commission order?

CONCLUSION

(1) Representing the Bay Area Rapid Transit District in quasi-legislative proceedings before the State Public Utilities Commission constitutes attempting to influence administrative action. Persons who attempt to influence administrative action on a substantial or regular basis are lobbyists. It is immaterial that the regulation governing electrified railroad transit systems, in reality, applies only to the Bay Area Rapid Transit District.

(2) The safety director of the Bay Area Rapid Transit District is not a lobbyist within the meaning of Government Code Section 82039 as a result of communicating with the Public Utilities Commission staff in compliance with a Commission order.

ANALYSIS

(1) Bay Area Rapid Transit District (BART) operates an electrified railroad transit system in the counties of Alameda, Contra Costa, San Francisco and San Mateo, California. The California Public Utilities Commission (PUC) has been given jurisdiction over the safety appliances and procedures of BART. PUC General Order 127 contains regulations governing the construction, maintenance and operation of rapid transit systems. While General Order 127 speaks in terms of governing all electrified railroad transit systems in California, BART is the only such system in existence at the present time. Attorneys from the law firm of Morrison & Foerster, which acts as special counsel to BART, and members of the BART staff from time to time contact the staff of the PUC and testify at public hearings concerning the amendment of General Order 127 and the need for additional regulations. The question before the Commission is whether by virtue of these contacts with the PUC these persons are lobbyists within the meaning of Government Code Section 82039^{1/} and as such are subject to the provisions of Chapter 6 of the Political Reform Act.

Lobbyist is defined in the Political Reform Act to include:

...[A]ny person who is employed or contracts for economic consideration, other than reimbursement for reasonable travel expenses, to communicate directly or through his agents with any elective state official, agency official or legislative official for the purpose of influencing legislative or administrative action, if a substantial or regular portion of the activities for which he receives consideration is for the purpose of influencing legislative or administrative action

Section 82039.

The PUC is a state agency and its commissioners and employees, therefore, are agency officials within the meaning of the Political Reform Act. Section 82004. Moreover, BART's special counsel and staff members receive economic consideration for time spent in communication with PUC officials. Thus, these persons will be lobbyists if they communicate with PUC officials on a substantial or regular basis for the purpose of

^{1/} All statutory references are to the Government Code unless otherwise noted.

influencing administrative action.^{2/}

Influencing legislative or administrative action means "promoting, supporting, influencing, modifying, opposing or delaying any legislative or administrative action by any means, including but not limited to the provision or use of information, statistics, studies or analyses." Section 82032; see also comment to 2 Cal. Adm. Code Section 18239(d). "Administrative action" means:

... the proposal, drafting, development, consideration, amendment, enactment or defeat by any state agency of any rule, regulation or other action in any rate-making proceeding or any quasi-legislative proceeding, which shall include any proceeding governed by Chapter 4.5 of Division 3 of Title 2 of the Government Code (beginning with Section 11371).

Section 82002.

We have been informed that the special counsel and staff members of BART contact the staff and testify before Commissioners of the PUC for the purpose of influencing decisions concerning the amendment of General Order 127 or the need to adopt additional regulations.^{3/} Thus, the only question left unresolved is whether these attempts to influence the actions of the PUC occur in the context of "quasi-legislative

^{2/} 2 Cal. Adm. Code Section 18239 defines what constitutes "substantial and regular" within the meaning of Section 82039. 2 Cal. Adm. Code Section 18239(e) sets forth one standard for employees and officials of local governmental agencies and another standard for all other individuals. BART is a local government agency (Section 82041) and, consequently, its employees and officials are subject to the provisions of Section 18239(e)(1). The special counsel, on the other hand, is not one of BART's employees or officials and, therefore, is subject to subsection (e)(2) of Section 18239.

^{3/} Carl Leonard of the law firm of Morrison & Foerster provided this information to a member of the Commission staff in a telephone conversation.

proceedings."^{4/} If the hearings concerning the operation of BART are quasi-legislative in nature, the special counsel and the staff members of BART will be attempting to influence administrative action.

In general, the declaration of a public policy and the implementation of means for its accomplishment are classified as calling for the exercise of legislative power. Hubbs v. People ex rel Department of Public Works, 36 Cal. App. 3d 1005, 1008 (1974). In the instant case, the declaration of public policy is that current and future mass transit systems in California shall be operated safely and efficiently. The regulations adopted by the PUC are the means by which the state is attempting to accomplish this policy:

Another relevant consideration in determining whether a proceeding is quasi-legislative is that quasi-legislative action usually involves an orientation towards future events. Quasi-legislative proceedings have as their purpose the creation of rules and regulations which establish standards for future conduct. City Council v. Superior Court, 179 Cal. App. 2d 389 (1960). Such proceedings, therefore, embrace not only administrative actions of general applicability but any prescribed standard of conduct to which private interests must conform in the future. See, e.g., Brown v. Board of Supervisors of San Francisco, 124 Cal. 274 (1899). In contrast, quasi-judicial action is characterized by an examination of past events and the adjudication of rights and privileges of specific parties. City Council v. Superior Court, supra.

^{4/}None of the proceedings excluded from the coverage of Section 82002 by 2 Cal. Adm. Code Section 18202 describes the proceeding in the instant case. Section 18202 provides:

(a) A proceeding of a state agency is not a quasi-legislative proceeding for the purposes of Government Code Section 82002 if it is any of the following:

- (1) A proceeding to determine the rights or duties of a person under existing laws, regulations or policies.
- (2) A proceeding involving the issuance, amendment or revocation of a permit, license or other entitlement for use.
- (3) A proceeding to enforce compliance with existing law or to impose sanctions for violations of existing law.
- (4) A proceeding at which an action is taken involving the purchase or sale of property, goods or services by such agency.
- (5) A proceeding at which an action is taken which is ministerial in nature.
- (6) A proceeding at which an action is taken awarding a grant or contract.
- (7) A proceeding involving the issuance of a legal opinion

Professor Kenneth Davis summarizes these concepts in the following passage:

Rules ordinarily look to the future, although, like statutes, they are occasionally retroactive. Relatively, adjudication looks backwards, typically applying law and policy to past facts, but, like equity decrees, declaratory judgments, and even orders to pay money, adjudications may be primarily concerned with the future. Opinions that accompany adjudications may have essentially the same effect as rules.

These various difficulties are avoided by saying simply that adjudication resembles what courts do in deciding cases, and that rule making resembles what legislatures do in enacting statutes

K. Davis, Administrative Law
Treatise, p. 287 (1958) (foot-
notes omitted)

In the instant case, the PUC instituted hearings to determine if accidents on the Bay Area Rapid Transit System necessitated amendment of current regulations or the adoption of new regulations. An essential part of such an investigation was an examination of BART's safety procedures which in turn produced an incidental by-product in the form of a report directed solely at BART. We think that the investigation was primarily quasi-legislative in character despite the judicial overtones of the safety report. The discussion of whether to amend or promulgate regulations prescribing future conduct resembled the activities of a legislature, not a court, and as such were quasi-legislative. The fact that a by-product of these hearings was a hybrid report consisting of both legislative and judicial features does not alter this conclusion.

Moreover, we reject the notion that these proceedings were not quasi-legislative because they did not concern matters of general applicability. It is true that although the safety procedures set forth in General Order 127 are couched in general terms, the only electrified railroad system of the type described therein is BART. We do not believe, however, that this fact standing alone is sufficient to change our characterization of these proceedings. Quasi-legislative proceedings, like private bills in the Legislature, are not limited to matters of general applicability. Davis, supra at 287.

Finally, we recognize that rules and regulations adopted under the Administrative Procedure Act, Sections 11371, et seq., must concern matters of general applicability.^{5/} However,

^{5/} Administrative Procedure Act, Section 11445, expressly exempts the PUC from the relevant provisions of the APA.

quasi-legislative proceedings, as described in Section 82002, merely include but are not limited to proceedings covered by the Administrative Procedure Act. The number of parties affected by or involved in a proceeding is immaterial to the determination of whether it is legislative or judicial in character. See K. Davis, Administrative Law Treatise, 287 (1958). It is merely a logical out-growth of the function of the proceeding which causes most, but not all, quasi-judicial proceedings to involve a limited number of persons while quasi-legislative proceedings involve larger segments of the public. There is no requirement that quasi-legislative proceedings must concern matters of general applicability.

Of course, even if a necessary component of quasi-legislative proceedings were the consideration of matters of general applicability, the proceedings in question would seem to meet this test. By its very terms, General Order 127 concerns matters of general applicability. All of the definitions and procedures are expressly designed to regulate any electrified train system in California, and nowhere in the regulations is there a specific reference to BART. Although at the moment BART is the only existing train system of this type, the PUC obviously designed these regulations for application to rapid transit systems which may exist in the future.

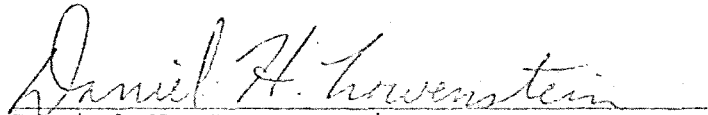
(2) As discussed above, a report on BART's safety procedures was a by-product of the Public Utilities Commission's hearings held to consider amendment of General Order 127. In this report, entitled Public Utility Commission's Decision No. 84582, BART was directed to provide the PUC information, on a continuing basis, so that the effectiveness of its safety procedures could be monitored. Pursuant to this order, BART has appointed its safety director to coordinate the flow of such information to the PUC. The question before us is whether by virtue of these activities the safety director may become a lobbyist subject to the provisions of Chapter 6 of the Political Reform Act.

In Part 1 of this opinion, we noted that a lobbyist is a person who is employed for the purpose of influencing legislative or administrative action, Section 82039, and that influencing administrative action is defined in Section 82002 to include influencing actions in a quasi-legislative proceeding. In the instant case, the information required by the PUC is not related to the hearings on General Order 127 or to any other quasi-legislative proceeding; rather, it is to be provided on a regular basis solely for the purpose of permitting the PUC to monitor BART's safety record. Thus, in compiling and forwarding the information, the safety director is not attempting to influence any administrative action by the PUC.

While the safety director limits his activities to the ministerial and administrative task of forwarding factual information on BART's safety record and procedures, he will not become a lobbyist subject to the requirements of Chapter 6. If, however, the safety director expands his activities and testifies before the PUC or prepares information analyzing or justifying BART's safety record for use by the PUC with a view to influencing decisions of the PUC in a quasi-legislative proceeding, he will be attempting to influence administrative action and, thus, may become subject to the provisions of Chapter 6.^{6/}

In conclusion, we note that we think it appropriate to apply this opinion prospectively only. Consequently, appearances before the PUC by attorneys representing BART and members of the BART staff which occurred prior to the issuance of this opinion need not be reported.

Approved by the Commission on April 23, 1976.
Concurring: Brosnahan, Carpenter, Lapan, Lowenstein and Quinn.



Daniel H. Lowenstein
Chairman

^{6/} The determining factor would be whether he engaged in such activities on a substantial and regular basis. See note 2, supra.