



California Fair Political Practices Commission

November 7, 1990

Richard H. Koppes
General Counsel
California Public Employees' Retirement System
Board of Administration
Lincoln Plaza, 400 P Street
Sacramento, CA 95814

Re: Your Request for Advice
Our File No. I-90-517

Dear Mr. Koppes:

This is in response to your request for written advice pertaining to the application of specified provisions of the Political Reform Act (the "Act")¹ to board members, officers and employees of the California Public Employees' Retirement System (PERS) who have authorized this request. Although your request is made on behalf of specified individuals, the questions that you pose are general in nature and are not directed to specific governmental decisions. Therefore, we are treating your request as one for informal assistance.²

FACTS

Effective January 1, 1990, Section 87200 was amended to include "other public officials who manage public investments" within the category of persons subject to the disclosure requirements of Article 2 of the Act. The Commission is in the process of determining who is covered by the term. You have requested advice with respect to issues raised by the amendment and by other recent amendments to the Act.

¹ Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

ISSUES AND ANALYSIS

1. Do PERS board members, officers or employees manage "public investments" within the meaning of the term as used in Section 87200?

In a staff memorandum issued March 22, 1990, we construed the term "public investments" to include investments made with "public moneys." You suggest that the term "public moneys" does not include monies held and invested by PERS, because the funds managed by PERS are trust funds pursuant to both the California Constitution³ and Section 20200⁴. You state that these funds are composed of employer and employee contributions and the interest thereon and are not public moneys or part of the general fund.

Our description of public investments in the March 22 memorandum as including "public moneys" was intended to encompass a wide spectrum of funds within the ambit of the term. A statutory definition of "public moneys" is set forth in Penal Code Section 426.⁵ Typically, that section has been broadly interpreted to include funds received by or held by a public official in his official capacity. (Center For Public Interest Law v. Fair Political Practices Commission 210 Cal. App.3d 1476 (1989); People v. Crosby, 141 Cal. App.2d 172 (1956); People v. Best 172 Cal. App.2d 692 (1959).) It is the official character

³ Article XVI, Section 17(a) of the California Constitution provides as follows:

The assets of a public pension or retirement system are trust funds and shall be held for the exclusive purposes of providing benefits to participants in the pension or retirement systems and their beneficiaries and defraying reasonable expenses of administering the system.

⁴ Section 20200 provides, in pertinent part, as follows:

The Public Employees' Retirement Funds is a trust fund created, and administered in accordance with the provisions of this part, solely for the benefit of the members and retired members of the System and their survivors and beneficiaries.

⁵ That section defines "public moneys," in pertinent part, as follows:

...[A]ll bonds and evidence of indebtedness, and all moneys belonging to the state, or any city, county, town, district, or public agency therein, and all moneys, bonds, and evidences of indebtedness received or held by state, county, district, city, town, or public agency officers in their official capacity.

in which the funds are received, rather than its ultimate ownership, which characterizes the funds as public moneys. (People v. Crosby, supra.)

...Penal code section 426's definition of "public moneys" is phrased in inclusive language so the definition is met if the money either belongs to the state or is received or held by a state officer acting in his or her official capacity. (Emphasis in original.)

Center For Public Interest Law, supra at 1481.

PERS is a state agency. Its board members, officers and employees hold and invest the state public employees' retirement trust funds. Even if the monies are not characterized as belonging to the state, they are nevertheless received or held by officers of the state acting in their official capacity. Therefore, we would characterize the retirement trust funds administered by PERS as "public moneys."

In any event, we believe that the definition of "public investments" for purposes of Section 87200 should be construed to include money held in public employee retirement trust funds. The Act should be liberally construed to accomplish its purposes. (Section 81003.) One of the purposes of the Act is to assure disclosure of assets and income of public officials which may be materially affected by their official actions in order that conflicts of interest may be avoided. (Section 81002(c).) The thrust of the new provision of Section 87200 is to assure that public officials who are in charge of investing funds held by a public agency are subject to the disclosure and disqualification provisions of the Act.

In order to clarify the application of the term "public investments" for purposes of Section 87200, staff is recommending that any regulation adopted to clarify the section specifically refer to public employee retirement funds. This should minimize confusion as to the scope of application.

2. Are various individuals who are employed by or contract with PERS "public officials who manage public investments" within the meaning of Section 87200?

As we discussed in our telephone conversation of September 4, 1990, the scope of application of the term "other public officials who manage public investments" as set forth in Section 87200 is still pending before the Commission. We anticipate that the Commission will adopt regulations to clarify this term within the next few months. At that time, we will review the positions that you describe to determine which, if any, would be covered by Section 87200. In the interim, we have been advising that individuals who currently file as designated employees, other than city and county treasurers, should continue filing disclosure on Form 730.

3. Do Sections 89503, 89505 and 89506 apply to individuals (other than members of state boards and commissions) who are subject to the broad reporting requirements of Section 87200?

Section 89503 provides as follows:

(a) No member of a state board or commission, and no designated employee of a state agency, shall accept an honorarium from any source, if the member or employee would be required to report the receipt of income or gifts from that source on his or her statement of economic interest. This section shall not apply to any part-time member of the governing board of any public institution of higher education, unless the member is also an elected official.

(b) Subdivisions (b), (c), (d), and (e) of Section 89502 shall apply to this section.

(c) Every state agency shall amend its conflict of interest code in accordance with this section no later than December 31, 1991. (Emphasis added.)

Section 89505 provides as follows:

(a) No member of a state board or commission, and no designated employee of a state agency, shall accept gifts with a total value of more than two hundred fifty dollars (\$250) in a calendar year from any single source, if the member or employee would be required to report the receipt of income or gifts from that source on his or her statement of economic interest. This paragraph shall not apply to any part-time member of the governing board of any public institution of higher education, unless the member is also an elected official. (Emphasis added.)

Section 89506 provides as follows:

(a) Payments, advances, or reimbursements for travel, including actual transportation and related lodging and subsistence which is reasonably related to a legislative or governmental purpose, or to an issue of state, national, or international public policy, is not prohibited or limited by this chapter if either of the following apply:

(1) The travel is in connection with a speech given by the elected state officer, member of a state board or commission, or designated employee of a state agency, the lodging and subsistence expenses are limited to the day immediately preceding, the day of, and the day immediately following the speech, and the travel is within the United States.

(2) The travel is provided by a government, a governmental agency, a foreign government, a governmental authority, a bona fide public or private educational institution, as defined in Section 203 of the Revenue and Taxation Code, or a nonprofit charitable or religious organization which is exempt from taxation under Section 501(c)(3) of the Internal Revenue Code, or by a person domiciled outside the United States which substantially satisfies the requirements for tax exempt status under Section 501(c)(3) of the Internal Revenue Code.

(b) Gifts of travel not described in subdivision (a) are subject to the limits in Sections 89504 and 89505.

(c) Subdivision (a) applies only to travel which is reported on the recipient's statement of economic interests.

(d) For purposes of this section, a gift of travel does not include any of the following:

(1) Travel which is paid for from campaign funds, as permitted by Article 4 (commencing with Section 89510), or which is a contribution.

(2) Travel which is provided by the agency of an elected state officer, member of a state board or commission, or a designated employee.

(3) Travel which is reasonably necessary in connection with a bona fide business, trade, or profession and which satisfies the criteria for federal income tax deduction for business expenses in Sections 162 and 174 of the Internal Revenue code, unless the sole or predominant activity of the business, trade, or profession is making speeches.

(4) Travel which is excluded from the definition of a gift by any other provision of this title.
(Emphasis added.)

The term "designated employee" does not include any public official covered by Section 87200. (Section 82019(d).) This would include any officers or employees of PERS who are deemed to be included in Section 87200 as "other public officials who manage public investments."

Based upon the foregoing, you contend that the prohibitions and limits imposed by Sections 89503, 89505 and 89506 do not apply to such officers and employees. They are not designated employees

of a state agency, elected state officers, or members of state boards or commissions.

The sections are part of newly-enacted legislation and do not become operative until January 1, 1991. Pending further action by the Commission to clarify these statutes by regulation, we would advise that a literal reading of Sections 89503, 89505 and 89506 suggests that persons who are neither elected state officers, designated employees of state agencies, nor members of state boards or commissions are not covered.⁶

4. How does the passage of Sections 89506 and 89504 affect application of Regulation 18728?

Regulation 18728 provides, in pertinent part, as follows:

As used in this section, "honorarium" means a payment for speaking at any event, participating in a panel or seminar or engaging in any similar activity. For purposes of this section, free admission, food, beverages and similar nominal benefits provided to a filer at an event at which he or she speaks, participates in a panel or seminar or performs a similar service, and reimbursement or advance for actual intrastate travel and for necessary accommodations provided directly in connection with the event are not payments and need not be reported by the filer....
(Emphasis added.)

The provisions of Regulation 18728 underlined above reflect the provisions emphasized in your letter requesting advice. Based upon this emphasis, we assume that you are requesting clarification concerning the effect of Sections 89504 and 89506 upon receipt of free admission, subsistence, lodging and travel in connection with specified activities of an elected state officer, a member of a state board or commission or a designated employee of a state agency.

⁶ This interim interpretation may change as a result of future regulatory action by the Commission. With respect to your contention as to the Commission's authority to promulgate regulations, we would point out that the Commission is charged with the duty to liberally construe the provisions of the Act to accomplish its purposes. (Section 81003.) In implementing the Act, it is necessary to look at the goals and intent of the Act as a whole, rather than by closely scrutinizing the components of whatever definition may be applicable. (In re Witt (1975) 1 FPPC Ops. 1, copy enclosed.) In Watson v. California Fair Political Practices Commission (1990) 217 Cal. App.3d 1059, the court affirmed the duty of the Commission to implement the intent rather than the literal language of statutes that make up the Act.

Section 89506 provides as follows:

(a) Payments, advances, or reimbursements, for travel including actual transportation and related lodging and subsistence which is reasonably related to a legislative or governmental purpose, or to an issue of state, national, or international public policy, is not prohibited or limited by this chapter if either of the following apply:

(1) The travel is in connection with a speech given by the elected state officer, member of a state board or commission, or designated employee of a state agency, the lodging and subsistence expenses are limited to the day immediately preceding the day of, and the day immediately following the speech, and the travel is within the United States.

(2) The travel is provided by a government, a governmental agency, a foreign government, a governmental authority, a bona fide public or private educational institution, as defined in Section 203 of the Revenue and Taxation Code, or a nonprofit charitable or religious organization which is exempt from taxation under Section 501(c)(b)(3) of the Internal Revenue Code.

(b) Gifts of travel not described in subdivision (a) are subject to the limits in Section 89504 and 89505.

(c) Subdivision (a) applies only to travel which is reported on the recipients statement of economic interests.

(d) For purposes of this section, a gift of travel does not include any of the following:

(1) Travel which is paid for from campaign funds, as permitted by Article 4 (commencing with Section 89501), or which is a contribution.

(2) Travel which is provided by the agency of an elected state officer, member of a state board or commission, or a designated employee.

(3) Travel which is reasonably necessary in connection with a bona fide business, trade, or profession and which satisfies the criteria for federal income tax deduction for business expenses in Sections 162 and 174 of the Internal Revenue Code, unless the sole or predominant activity of

the business, trade, or profession is making speeches.

(4) Travel which is excluded from the definition of a gift by any other provision of this title.

Section 89504 provides as follows:

(a) No elected state officer shall accept gifts from any single source in any calendar year with a total value of more than two hundred fifty dollars (250).

(b) This section shall not prohibit or limit the following:

(1) Payments, advances, or reimbursements for travel and related lodging and subsistence permitted by Section 89506.

(2) Wedding gifts and gifts exchanged between individuals on birthdays, holidays, and other similar occasions, provided that the gifts exchanged are not substantially disproportionate in value.

(c) For purposes of this section, "elected state officer" includes Insurance Commissioner.

(d) The gift limitation amounts in this section shall be adjusted biennially by the commission to reflect changes in the Consumer Price Index, rounded to the nearest ten dollars (\$10).

(e) The limitations in this section are in addition to the limitations on gifts in Section 86203.

Initially, we note that these sections do not become effective until January 1, 1991. Additionally, these sections apply only to state officials. Regulation 18728 would still apply to other public officials. We further note that Section 89506 only describes payments which will not be subject to gift or honoraria limitations. It does not affect disclosure. Thus, if a payment for travel, lodging, subsistence or free admission is reportable, Section 89506 will not alter that requirement.

Regulation 18728 clarifies Section 87207 which sets forth the disclosure requirements for income and gifts. Regulation 18728 states that certain payments provided to a filer directly in connection with speaking at any event, participating in a panel or seminar or engaging in any similar activity are not "payments" under the Act and need not be reported. (Regulation 18728(a).)

The exemption from the gift and honoraria limits set forth in Section 89506(a), by its terms, applies only to travel which is reported on the recipient's statement of economic interests. (Section 89506(c).) Thus, if certain travel payments are not reportable under Section 87207, they are also not subject to the exemption provided in Section 89506(a).

Therefore, it would appear that Sections 89504 and 89506 do not affect application of Regulation 18728 as that regulation interprets Section 87207. If you have specific questions concerning application of these provisions, we will be glad to review them with you. Please bear in mind that Sections 89504 and 89506 are not even in effect at present. It is likely that the Commission will be adopting regulations to clarify these provisions in the near future.

5. What changes to PERS Conflict of Interest Code are required by Sections 89503(c) and 89505(c)?

Sections 89503 and 89505 require every state agency to amend its conflict of interest code by December 31, 1991, to comply with the provisions of these sections limiting honoraria and gifts. You have proposed language amending PERS' conflict of interest code to satisfy this requirement.

We agree that every state agency will be required to amend its conflict of interest code to comply with Sections 89503 and 89505. The draft language that you have submitted appears to meet the requirements of those sections. However, we would prefer to defer approval of specific language until we have had a further opportunity to review the scope of these sections.

6. When does the 12-month period set forth in Section 87103(e) begin to run for disqualification purposes?

Section 87103 provides, in part, as follows:

An official has a financial interest in a decision within the meaning of Section 87100 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 or a member of his or her immediate family or on:

* * *

(e) Any donor of, or any intermediary or agent for a donor of, a gift or gifts aggregating two hundred fifty dollars (\$250) or more in value provided to, received by, or promised to the public official within 12 months prior to the time when the decision is made.... (Emphasis added.)

For purposes of this section, a public official must count back 12 months from the date of any decision which he or she intends to make, participate in making or use his or her official position to influence. If the official has not been provided with, received, or been promised gifts aggregating \$250 within that 12-month period, he or she would not be precluded from participating in the decision by virtue of subdivision (e).

By way of illustration, you pose the following example:

Assume that Company X gives a public official a gift worth \$50 on September 1, 1989; another gift worth \$150 on July 1, 1990; another gift worth \$100 on August 1, 1990, and another gift worth \$100 on December 31, 1990. Could the public official in this example have participated in a decision which affected Company X, on December 1, 1990, because he had not received gifts aggregating \$250 in the 12 months prior to December 1, 1990?

The public official in your example has received gifts aggregating \$250 within the 12 months prior to the decision and could not participate--\$150 on July 1, 1990, and \$100 on August 1, 1990. Please note that the \$100 received on December 31, 1990, does not affect the validity of the official's participation in the decision on December 1, 1990, unless the official was promised the gift received on December 31, 1990, prior to the decision.

7. Are individuals who are subject to the broad reporting requirements of Government Code Sections 87200 and 87203 required to report business positions which foreseeably may be affected materially by any decision made or participated in by the designated employee by virtue of his or her position?

Individuals included in Section 87200 are required to file disclosure statements which disclose investments, interests in real property, and income (including gifts). (Section 87203.) They are not required to disclose business positions.

8. Are the statutes and regulations which govern disqualification the same for public officials who are subject to the broad reporting requirements of Government Code Section 87200 as for designated employees under PERS' Conflict of Interest Code?

The statutes and regulations governing disqualification are the same for public officials who are subject to Section 87200 as for designated employees subject to a conflict of interest code. The basic prohibitions are set forth in Sections 87100 - 87103.5 and in Regulations 18700 - 18729.

I trust that the foregoing has provided you with the information that you need. If you have any questions regarding the above, you may contact me at (916) 322-5901.

Sincerely,

Scott Hallabrin
Acting General Counsel



By: Margaret W. Ellison
Counsel, Legal Division

SH:ME:dg