



California Fair Political Practices Commission

June 21, 1993

Richard Koppes
General Counsel
Public Employees Retirement System
P.O. Box 942707
Sacramento, CA 94229-2707

Re: Your Request for Advice
Our File No. A-93-163

Dear Mr. Koppes:

You have requested advice on behalf of Mr. Jerry P. Cremins, a member of the Board of Administration of the Public Employees' Retirement System ("PERS") regarding his duties under the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ This advice is based upon the facts provided in your letter and my telephone conversations with Mr. Cremins on June 2 and 4, 1993.

Please note that our advice is limited only to the provisions of the Act. If you seek assistance regarding other conflict-of-interest provisions, such as Government Code Section 1090, please contact the Attorney General's Office.

QUESTION

Under the Act, may Mr. Cremins participate in the PERS Board decision to adopt the "Responsible Contractor Program"?

CONCLUSION

Mr. Cremins may participate in the PERS decision to adopt the "Responsible Contractor Program" unless it is reasonably foreseeable that this program will have a material financial effect on the State Building and Construction Trades Council of California, which is a source of income to Mr. Cremins. From the facts presented, it does not appear that the PERS decision will

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.

have a reasonably foreseeable financial effect on the State Building and Construction Trades Council.

FACTS

Mr. Cremins is President of the State Building and Construction Trades Council of California ("Council"), a nonprofit organization of California locals of national labor unions, whose members work in the building and construction trades and participate in the construction of residential and commercial buildings throughout California.

Mr. Cremins is elected by delegates to a convention and reports to an executive board of members. The executive board evaluates his performance and sets his salary. Mr. Cremins' salary is neither dependent upon the number of members in any of the building trades unions nor upon the increase or decrease in the rate of employment of those members. His salary is not tied to the per capita assessment of the members.

Mr. Cremins has been a member of the Board of Administration of PERS since December 12, 1992. Prior to his becoming a board member, PERS was investing in the construction of commercial and residential housing in California, mainly as joint investments with other investors. These projects have been brought to the PERS Board by its various outside consultants with expertise in the creation of investments in building projects.

In January 1993, a proposal to adopt a "Responsible Contractor Program" ("program") was presented to the PERS Board. This program would affect proposed, existing and future construction projects. PERS has hired the consulting firm of PCA/KL & Co. to assess the program. According to their April 19, 1993 report, the program, which is a proposed revision to PERS' existing labor policy, includes the following four features:

- 1) Pertinent background information such as performance and financial information would be collected on any contracting firm bidding on PERS projects.
- 2) The contractor must be registered in an apprenticeship training program.
- 3) The contractor is required to provide employees with employer-paid health insurance from a California licensed company or be self-insured.
- 4) The contractor must contribute to a pension program established for the purpose of providing retirement income to beneficiaries.

The consulting firm has received other versions of responsible contracting from interested third parties, which will be reviewed in the next phase of their report.

The written comments by some of PERS' outside real estate consultants suggest that, while not explicitly doing so, the adoption of the program would, in effect, restrict employees to union membership. They submit that this result would occur because most unions currently meet the criteria of the program. However, the consultants' report states that "responsible contracting" need not necessarily mean "union labor." (Phase I report, April 19, 1993.) It is Mr. Cremins' opinion that the program sets standards for contracting which apply to all contractors, both union and non-union.

Mr. Cremins' only source of income is the salary he receives as the president of the Council, a position he has held for over ten years. The Council is composed of each of the 302 local unions that comprise the building and construction trades in California. Payments are made to support the Council by each of the unions in proportion to their membership with per capita assessments. The larger the dues-paying membership, the greater the contribution that a particular union makes to the Council's treasury. The gross annual receipts from per capita is approximately \$2 million.

Mr. Cremins has no investment in any business entity and no real property interest that would be affected by the program. His only real property is his home and he does not contemplate any improvements in the foreseeable future.

ANALYSIS

Section 87100 prohibits public officials from making, participating in, or using their official position to influence a governmental decision in which they know or have reason to know they have a financial interest.

An official has a financial interest in a governmental 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 on a member of the official's immediate family, or on:

(a) Any business entity in which the public official has a direct or indirect investment worth one thousand dollars (\$1,000) or more.

(b) Any real property in which the public official has a direct or indirect interest worth one thousand dollars (\$1,000) or more.

(c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to

official status, 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.

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

(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.

Section 87103.

Accordingly, Mr. Cremins may not make, participate in making, or attempt to use his official position to influence a governmental decision if the decision will have a reasonably foreseeable material financial effect, distinguishable from the effect on the public generally, on the State Building and Construction Trades Council, which is a source of income to him. (Section 87103(c).)

Foreseeability

The effects of a decision are reasonably foreseeable if there is a substantial likelihood that they will occur. To be foreseeable, the effects of a decision must be more than a mere possibility; however certainty is not required. (Downey Cares v. Downey Community Development Com. (1987) 196 Cal. App. 3d 983, 989-991; Witt v. Morrow (1977) 70 Cal. App. 3d 817, 822; In re Thorner (1975) 1 FPPC Ops. 198.) The Act seeks to prevent more than actual conflicts of interest; it seeks to prevent even the appearance of a possible conflict of interest. (Witt v. Morrow, supra at 823.)

Mr. Cremins stated that it is not reasonably foreseeable that the program will have a financial effect on the Council since a decision to adopt the program would affect both the labor-union members of the Council, as well as non-union labor. Mr. Cremins also stated that it is impossible to assess how the program would affect the Council. For example, union work hours are down 37 percent this year, attributable to the state of the economy. Therefore, the Council's gross annual receipts from per capita assessments are 37 percent less. If a union member works more, his per capita assessment to the Council increases, but it would not be possible to correlate this solely to implementation of the program. This increase would definitely be attributable to an upswing in the economy, but not necessarily to implementation of

the program. Therefore, Mr. Cremins stated that the program's effect on the Council is too speculative.²

Materiality

If it is reasonably foreseeable that this PERS decision will have a financial effect on the Council, the next inquiry is whether the effect of the decision will be "material." The Commission has adopted several regulations which define material financial effect. Regulation 18702.5 (copy enclosed) is used to determine when the effect of a decision is material as to a nonprofit entity which is a source of income to an official.

According to the facts provided by Mr. Cremins, the Council's gross annual receipts from per capita are approximately \$2 million. (The per capita assessment is one cent per hour worked.) Therefore, we apply Regulation 18702.5(d) to determine if the decision to adopt the "Responsible Contractor Program" will have a material financial effect on the Council. Pursuant to Regulation 18702.5(d), the effect of a decision is material if any of the following applies:

(d) For an entity whose gross annual receipts are more than \$1,000,000, but less than or equal to \$10,000,000 the effect of the decision will be any of the following:

(1) The decision will result in an increase or decrease of the entity's gross annual receipts for a fiscal year in the amount of \$100,000 or more.

(2) The decision will cause the entity to incur or avoid additional expenses or to reduce or eliminate existing expenses for a fiscal year in the amount of \$25,000 or more.

(3) The decision will result in an increase or decrease in the value of the entity's assets or liabilities in the amount of \$100,000 or more.


Based upon the facts you have provided, it does not appear that PERS' adoption of the "Responsible Contractor Program" will have a reasonably foreseeable financial effect on the Council. On this basis, it is permissible for Mr. Cremins to participate in this PERS decision. In addition, even if the financial effect of the decision on the Council is reasonably foreseeable, Mr. Cremins may still participate unless the effect of the decision is material under Regulation 18702.5.

² The Commission does not act as the finder of fact in providing advice. (In re Ogelsby) (1975) 1 FPPC Ops. 71.)

I trust this answers your question.

Sincerely,

Jeff Marschner
General Counsel


By: Jill Stecher
Legal Counsel

JM:JS:ak

Enc.