



California
Fair Political
Practices Commission

SUPERSEDED
by A-00-033(Gillan)

May 4, 1994

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

Re: Your Request for Advice
Our File No. A-94-121

Dear Mr. Koppes:

This is in reply to your request for advice concerning whether the elections to fill certain board positions at the Public Employees' Retirement System ("PERS") are subject to the provisions of the Political Reform Act (the "Act").¹

Since your question relates to specific board positions, the advice herein will provide the immunity under Section 83114(b) to any persons who are or become candidates for those positions.

QUESTIONS

1. Do the provisions of the Act which regulate campaign activities apply to candidates who are running for election to the PERS Board?
2. Are candidates who are running for election to the PERS Board required to file statements of economic interests under Section 87201?
3. Assuming that the provisions of the Act regulating campaign activities do not apply to candidates for election to the PERS Board, are campaign contributions (including in-kind contributions) made to these candidates gifts under 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, Sections 18000-18954. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

CONCLUSIONS

1. The provisions of the Act which regulate campaign activities do not apply to candidates who are running for election to the PERS Board.

2. Candidates who are running for election to the PERS Board are not required, by virtue of that candidacy, to file statements of economic interests under Section 87201.

3. Campaign contributions (including in-kind campaign contributions) made to and used by a candidate for election to the PERS Board solely for the purpose of supporting that candidacy are not gifts for purposes of the Act. However, if such a contribution, or any part thereof, is made to or used by the candidate for a purpose other than to support his or her candidacy, the contribution or relevant part thereof will be a gift and, depending on the candidate's status as a public official, may be subject to the reporting, gift limitations and conflict-of-interest provisions of the Act.

FACTS

By statute, the PERS Board of Administration consists of thirteen members. Of these, six are elected under the Board's supervision. (Section 20100(g).) Of the remaining seven Board members, two, the State Treasurer and the State Controller, hold office by virtue of holding statewide elected office., (Section 20100(c) and (d).) The rest of the Board members hold office by virtue of appointment. (Section 20100(a), (b), (e), and (f).) This request for advice pertains only to PERS Board members who hold PERS Board seats under Section 20100(g) (election by the PERS Board membership).

The PERS Board is responsible for developing its own procedures for the election of the six Board members elected from the membership. (California Constitution Art. XVI, Section 17; Section 20102.) Accordingly, the PERS Board has enacted regulations which govern its elections (see Title 2, California Code of Regulations, Section 554 et seq.) and is currently in the process of amending those regulations.

The six PERS Board members elected from the membership are elected by the following constituencies: two are elected by members of the system (i.e., elected by all active and retired PERS members, commonly referred to as the "members-at-large"); one is elected by active state members; one is elected by active school members; one is elected by active local (except school) members; and one is elected by retired members. (Section 20100(g).) Board members are elected for four year terms. (Section 20101.) If a seat becomes vacant during the term, the PERS Board conducts a special election. (Section 20100.)

PERS Board member terms are staggered. In the first year of the cycle, an election is held for the three seats representing active state, school, and local members. In the second year, an election is held for the retiree representative. There is no election in the third year, and, in the fourth year, an election is held for the two member-at-large positions.

In the last member-at-large election, there were approximately 876,000 potential voters. In the last state, school, and local member elections, there were approximately 207,000, 218,000, and 202,000 potential voters, respectively. PERS projects that in the next retired member election, there will be approximately 250,000 voters. Under current regulations, PERS mails ballots directly to retired members, and forwards ballots for all active members to agency election officers for distribution. (Title 2, California Code of Regulations, Section 554.5.) Under the new proposed regulations, PERS will mail ballots directly to all potential voters. PERS canvasses the returned ballots and the Secretary of State certifies the results. (Title 2, California Code of Regulations, Section 554.6.)

The number of candidates for the PERS Board member seats varies. Typically, there are approximately 35 candidates in a member-at-large election, and less for the other elections. There were four candidates (including incumbents) in the last local member election, thirteen candidates in the last state member election, five in the last school member election, and four candidates in the last retired member election.

It takes approximately one year to conduct an election. Typically, the voting portion of the election occurs between October and November, for seats which will be assumed the following January.

PERS is currently in the process of preparing for and conducting an election for the three positions which represent active state, school, and local members. During this process, questions have arisen as to the restrictions which may apply to candidates for PERS Board seats who accept contributions for campaign purposes.

ANALYSIS

Applicability of the Act's Campaign Provisions

Under the Act, candidates for state and local office must comply with several requirements. They must file various committee and campaign related reports concerning the monetary activities of their campaigns. (Sections 84100-84216.5.) They must comply with restrictions on the handling of contributions, on the making of campaign expenditures, on the making of campaign mailings and on their official actions in relation to their contributions. (Sections 84300-84309.) Finally, they must file a

separate statement of intention to be a candidate with the Commission and maintain a separate campaign bank account for each office to which they seek election. (Sections 85200, 85201.)

You ask whether candidates seeking election to the PERS Board are subject to these provisions of the Act. Section 82007 defines "candidate," in relevant part, as:

... an individual who is listed on the ballot or who has qualified to have write-in votes ... for election to any elective office, or who receives a contribution or makes an expenditure ... with a view to bringing about his or her ... election to any elective office

Section 82022 defines elective office as:

... any state, regional, county, municipal, district or judicial office which is filled at an election

On the basis of these definitions, if an election to the PERS Board is an election to "state office," then candidates for these elections are regulated by the Act.

However, the Act does not define the term "state office." Instead, it defines the term "elective state office," which means:

... the office of Governor, Lieutenant Governor, Attorney General, Insurance Commissioner, Controller, Secretary of State, Treasurer, Superintendent of Public Instruction, member of the Legislature and member of the State Board of Equalization.

In addition, Section 82021 defines "elected state officer" to mean "any person who holds an elective state office" Finally, other portions of the Act, which regulate the in-office activities of state elected officials, make no reference to elected members of the PERS Board, but only to "elected state officers." (Sections 87102, 87102.8 (conflicts of interest); Section 89502 (honorarium prohibition); Section 89504 (gift limitation).) Based on these various provisions, we believe that the drafters of the Act did not intend to include candidates for election to the PERS Board under the Act's campaign requirements.

In addition, PERS is unique in that its primary duty is as a trustee, holding and investing the retirement assets of current and retired public employees.² Given the closed nature of PERS'

² The Public Employee's Retirement Fund, which PERS administers, is "a trust fund created, and administered ... solely for the benefit of the members and retired members of the [state employees' retirement] system and their survivors and beneficiaries." (Section 20200.)

membership and the relatively restricted scope of PERS' primary duty (i.e., to manage the members' retirement assets), this is not the type of body whose elections are regulated by the Act.

Accordingly, candidates for election to the PERS Board are not, by virtue of that candidacy, subject to the Act's campaign provisions.

Applicability of Section 87201

Section 87201 requires that "[e]very candidate for an office specified in Section 87200" file a statement disclosing certain financial assets. Included among the offices listed in Section 87200 are "public officials who manage public investments."

PERS Board members are "public officials who manage public investments" under Section 87200 (see Regulation 18720(b)(1)³). Therefore, you ask whether candidates for election to the PERS Board are subject to the requirements of Section 87201.

As discussed above, we do not believe that candidates for election to the PERS Board are the types of candidates who are or were meant to be regulated by the Act. Therefore, Section 87201 does not apply to PERS Board candidates by virtue of that candidacy.⁴

Campaign Contributions to PERS Board Candidates

As discussed above, candidates for election to the PERS Board are not candidates for purposes of the Act. Accordingly, campaign contributions made to these candidates are not subject to regulation by the Act in the form of campaign contributions.

However, these contributions are arguably gifts under the Act. The Act regulates gifts to sitting PERS Board members in several different ways. First, gifts over certain amounts must be reported on their statements of economic interests. (See Sections 87200, 87202-87205 and 87207.) Second, gifts are limited to \$270 per calendar year from a single source.⁵ (Section 89505; Regulation 18954.) Third, they cannot accept gifts from lobbyists or lobbying firms in excess of \$10 per month. (Sections 86204,

³ Regulation 18720 was adopted by the Commission at its March 3, 1994 meeting.

⁴ If a PERS Board candidate is simultaneously a candidate for an office which is covered by Section 87200, Section 87201's requirements would apply by virtue of the latter candidacy.

⁵ The gift limit amount is adjusted each odd-numbered year to reflect changes in the Consumer Price Index. (Sections 89505(b), 89504(d); Regulation 18954.)

86203.) Finally, a gift of \$250 or more during the 12 months prior to a PERS Board decision may disqualify the Board member from participating in that decision. (Sections 87100, 87103.)

Section 82028 defines gift as "any payment to the extent that consideration of equal or greater value is not received" Conversely, Section 82015 defines "contribution" as "a payment ... except to the extent that full and adequate consideration is received unless it is clear from the surrounding circumstances that it is not made for political purposes." Thus, if a payment is made to a sitting PERS Board member for a political purpose and the official gives no consideration in exchange, it is a contribution and not a gift.

While we concluded above that the activities of candidates who are running for election to the PERS Board are not subject to the Act's campaign provisions, this still does not change the essentially political nature of contributions made to these candidates. The contributions are made to further the candidacy of persons who are running for election to a government office.⁶ As such, they are for a political purpose and are contributions, though unregulated, for purposes of the Act. Therefore, they are not gifts and, except as explained below, carry none of the restrictions on gifts imposed by the Act.

However, problems could occur for the Board member if he or she receives cash contributions or in-kind contributions such as office equipment or other tangible items that could be used for personal purposes. To the extent that cash contributions or in-kind contributions such as office equipment are made to a PERS Board member who is a candidate for reelection to the Board and used solely in connection with that candidacy, there is no gift. However, to the extent that the Board member uses cash or in-kind contributions for a purpose other than to support his or her candidacy, that portion of the contribution is a gift to the Board member and subject to the gift limitations and restrictions of the Act.⁷

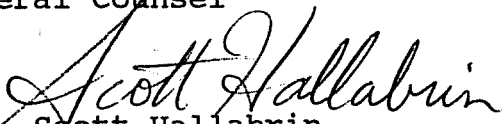
⁶ "Political" as defined in Webster's New World Dictionary (2nd College Ed., 1974, p. 1103) means "of or concerned with government"

⁷ It may be to the public benefit if PERS, by virtue of its authority to regulate Board elections, required Board candidates to publicly disclose contributions made to them to support their PERS candidacy.

Should you have any questions, please contact me at 916/322-5901.

Sincerely,

Steven G. Churchwell
General Counsel


By: Scott Hallabrin
Assistant General Counsel

SGC:SH:ak