

RAVI MEHTA
CHAIRMAN



FAIR POLITICAL PRACTICES COMMISSION

January 17, 1996

Gerald Geismar
Executive Director
Employment Training Panel
1100 J Street, 4th Floor
Sacramento, CA 95814

Re: Your Request for Advice
Our File No. A-95-407

Dear Mr. Geismar:

This is in response to your letter requesting advice regarding the responsibilities of the members of the Employment Training Panel Advisory Research Counsel under the provisions of the Political Reform Act (the "Act").¹

Please note that this letter is based on the facts presented to us. The Commission does not act as the finder of fact in providing advice. (In re Oglesby (1975) 1 FPPC Ops. 71.) Moreover, the advice contained herein is limited to the provisions of the Act and do not take into consideration any prohibitions contained in provisions outside the Political Reform Act (See e.g., Government Code Section 1090).

QUESTION

Newly enacted Section 87104 prohibits any public official of a state agency (including members of advisory committees of a state agency) from acting as an agent or attorney for, or otherwise representing, any other person for compensation before his or her agency or any officer or employee thereof, if the appearance or communication is made for the purpose of influencing

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 18000-18995. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

action on a contract, grant, loan, license, permit, or other entitlement for use.

You have asked how the enactment of Section 87104 affects the members of the Employment Training Panel Advisory Research Council.

CONCLUSION

Any individual who serves as a member of the Employment Training Panel Advisory Research Council is prohibited from acting (for compensation) as an agent or attorney for, or otherwise representing, any other person by making any formal or informal appearance before, or by making any oral or written communication to, the Employment Training Panel or the Employment Training Panel's Advisory Research Council, or any officer or employee thereof, if the appearance or communication is made for the purpose of influencing action on a contract, grant, loan, license, permit, or other entitlement for use.

FACTS

The Employment Training Panel (the "panel") is a special fund state agency created to provide job training funds to businesses and nonprofit entities. The panel distributes funds through contracts with employers, groups of employers, training agencies (including private and public schools, such as community colleges) and Private Industry Councils (PICs). The panel provides approximately \$76 million dollars to contractors through training agreements.

As part of new amendments to the Government Code sections governing the panel, the Legislature requires the panel to create an Advisory Research Council (the "council"). The legislation provides that the council, in addition to any other duty, conduct a review of panel policies with the goal of developing an improved process for developing, funding, and implementing panel contracts. This review may include, but shall not be limited to, an examination of all of the following:

- (1) The necessity for minimum training hours.
- (2) The ratio between fixed classroom training and structured on-site training.
- (3) Training across job classifications within the same industry base.
- (4) Voluntary training after hours.
- (5) Grievance processes.
- (6) Reimbursement timelines.

(7) Contract approval, amendment and modification processes.

According to conversations with Peter G. DeMauro of your office, the council will not be making final decisions, but will be making recommendations to the panel. The panel is then required under the statute to submit an interim report to the Legislature which includes the council's recommendations by April 1, 1996, and a final report by the end of 1996.

ANALYSIS

Sections 87100 and 87103

The Act requires that every public official disclose his or her economic interests that could foreseeably be affected by the exercise of the official's duties. (Sections 81002(c), 87200-87313.) "Public official" is defined in Section 82048 and Regulation 18700(a)(1) to include members of boards and commissions:

(1) "Member" shall include, but not be limited to, salaried or unsalaried members of boards or commissions with decisionmaking authority. A board or commission possesses decisionmaking authority whenever:

(A) It may make a final governmental decision;

(B) It may compel a governmental decision; or it may prevent a governmental decision either by reason of an exclusive power to initiate the decision or by reason of a veto which may not be overridden; or

(C) It makes substantive recommendations which are, and over an extended period of time have been, regularly approved without significant amendment or modification by another public official or governmental agency.

According to the information you have provided, members of the council will not make final governmental decisions and will not have the power to compel decisions or veto them. Thus, the council would be an advisory body and the council's members would not be "public officials" as defined in Section 82048 and Regulation 18700(a)(1). Consequently, members of the council are not subject to the disclosure and disqualification provisions of the Act.

However, once constituted, if the council's substantive recommendations are regularly approved without significant amendment or modification over an extended period of time, then the members of the council will qualify as public officials pursuant

to Regulation 18700(a)(1)(C). At that time the disclosure and disqualification requirements of the Act would apply.

Section 87104

The main thrust of your question pertains to new Section 87104, which became effective January 1, 1995. This section provides:

(a) No public official of a state agency shall, for compensation, act as an agent or attorney for, or otherwise represent, any other person by making any formal or informal appearance before, or by making any oral or written communication to, his or her state agency or any officer or employee thereof, if the appearance or communication is made for the purpose of influencing action on a contract, grant, loan, license, permit, or other entitlement for use.

Section 87104(b) provides a broader definition of "public official" for purposes of this section. A "public official" is any person defined in Section 82048, and every member of any advisory committee of a state agency, whether the committee is created by statute or otherwise.

Thus, for purposes of Section 87104, the members of the council would be considered public officials subject to that section's prohibition.

1. Does Section 87104 Prohibit Certain Individuals from Serving on the Council?

Section 87104 does not act as a bar to anyone serving on the council. However, the section will limit that person's conduct once they are on the council. For example, if an individual was an employee of a contractor or potential contractor, the individual would be prohibited from acting as an agent or attorney for, or otherwise representing, any other person by making any formal or informal appearance before, or by making any oral or written communication to, the panel or any officer or employee of the panel, if the appearance or communication is made to influence the agency's action on a contract, grant, loan, license, permit, or other entitlement for use.²

Thus, for example, an employee of a current contractor or potential contractor may serve on the council, but may not appear

² please note that the prohibition in Section 87104 is very broad and applies to any communication to the agency (or employees of the agency) and for the purpose of influencing action on a contract, grant, loan, license, permit, or other entitlement for use.

on behalf of the employer to influence the panel's decision on a contract.

2. Is the Employer of a Member Barred from Negotiating or Bidding on a Contract with the Panel?

The conflict of interest rules are personal to the public official in question. The activities of the official's private sector employer or the other employees of the employer are not regulated by the Act. Thus, while the member of the advisory council may not influence the panel, the employer may have other employees communicate with the panel about a contract.

3. Does Section 87104 Apply to Consultants, Agents or Attorneys of a Contracting Organization?

Section 87104 would apply to any member of the council. Thus, where a consultant, agent or attorney representing a contractor or potential contractor is a member of the council, the same prohibitions discussed above would apply.

For example, if a member of the council is retained by a contractor to be the contractor's agent, the agent/member may not appear on behalf of the contractor for compensation to influence the panel's decision on a contract. This same rule would apply where the agent/member is an employee of a firm that is retained by the contractor. The agent/member may not appear on behalf of the contractor/client for compensation to influence the panel's decision on a contract whether the compensation comes from the employer or the client (or any other person).

Consequently, consultants, agents or attorneys representing contractors may serve on the council, but may not appear on behalf of any client for compensation to influence the panel's decision on a contract.

4. Does Section 87104 Apply to Persons from Training Agencies of a Contracting Organization?

The same analysis discussed above would apply. These individuals may serve on the council, but may not appear on behalf of the employer or any client of the employer to influence the panel's decision on a contract.

5. What Constitutes "Compensation" Under Section 87104?

The prohibition in Section 87104 applies in situations where the member will be compensated by some third party. This requirement is similar to that set forth in Section 87400 et seq., and 87406. In the Simonian Advice Letter, No. I-94-001, we stated that a person was not "compensated" to influence a decision if the individual is not being compensated by any other person for the purpose of influencing the decision. For example, if a member appeared on a voluntary basis before the panel on behalf of a

nonprofit, and received no compensation, the section would not prohibit the appearance.

You specifically asked whether a member would be prohibited from appearing before the panel where the income the member receives is through a subcontract to the contract with the panel. If the member receives compensation from any other person to act as an agent or attorney for, or otherwise represent, any other person (by making any appearance or oral or written communication to the panel or any officer or employee of the panel) to influence the actions of the panel regarding a contract, grant, loan, license, permit, or other entitlement for use, it falls within the prohibition. This would be the case even where the member receives compensation for this purpose from sources other than the contractor.

6. Would the Prohibition Apply to Representatives of Employer Groups?

As noted above, the compensation can come from any other source; this would include an association representing employers. Thus, if the other requirements of the statute are satisfied, the prohibition would apply. Of course, the express terms of the statute limit the prohibition to communications made for the purpose of influencing action on a contract, grant, loan, license, permit, or other entitlement for use.

7. Would the Prohibition Apply to Representatives of Private Industry Councils (PICs)?

The same rules discussed above would apply to members who are employed by PICs.

8. Would the Prohibition Apply Where a Member of the Council Becomes Employed by a Contractor After Appointment to the Council?

Since the prohibition is on the conduct of the member, it applies irrespective of when an employment relationship is established or contract made. So long as the individual is a member, the prohibition will apply.

9. Public Entity Contractors

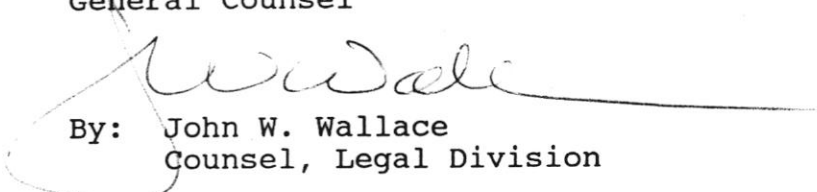
The prohibition in Section 87104 applies where the member acts for compensation to represent any other person. "Person" is broadly defined in Section 82047 to include any individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, company, corporation, association, committee, and any other organization or group of persons acting in concert. This definition has been construed to include public agencies within its scope. (In re Witt (1975) 1 FPPC Ops. 1; Evans Advice

Letter, No. I-86-117.) Thus, Section 87104 would apply to members employed by public agencies to represent them before the panel.

If you have any further questions regarding this matter, please feel free to contact me at (916) 322-5660.³

Sincerely,

Steven G. Churchwell
General Counsel



By: John W. Wallace
Counsel, Legal Division

³ Copies of Commission regulations and Opinions are available in many law libraries. Alternatively, copies of these materials and Commission advice letters may be obtained from the Commission at a cost of 10¢ per page.