

RAVI MEHTA
CHAIRMAN



FAIR POLITICAL PRACTICES COMMISSION

March 7, 1996

Margret D. Merlock, Member
Tri-City Hospital District
Board of Directors
1905 Calle Buena Ventura
Oceanside, CA 92056

Re: Your Request for Informal Assistance
Our File No. I-96-051

Dear Ms. Merlock:

This is in response to your letter requesting advice regarding your responsibilities as a member of the Board of Directors of the Tri-City Hospital District under the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ You have not provided sufficient facts concerning specific decisions. (Regulation 18329(b)(8).) Therefore, we are treating your request as one for informal assistance.²

QUESTION

May you participate in decisions of the Tri-City Hospital District regarding possible affiliation with two other hospital districts, where you are employed by a nonprofit hospital that competes from some of the Tri-City Hospital District patients?

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.

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

CONCLUSION

You may participate in the decisions so long as the hospital affiliation decisions will not have a material financial effect on your employer. We do not have enough facts to make a definitive ruling.

FACTS³

You have been a member of the Board of Directors of Tri-City Hospital District (Tri-City) in Oceanside, California since 1983. Tri-City is currently discussing possible affiliation with two other hospital districts (Fallbrook and Palomar). The affiliation decisions will include discussion of various cost-savings measures. For example, the decisions may involve issues concerning joint purchases and development of one nurse registry.

You are employed as a recovery room nurse by Scripps Memorial Hospital, a nonprofit entity. Your income from Scripps exceeds \$250 per year. You are employed at the Encinitas facility of Scripps Memorial Hospital. Approximately five percent of the in-patient admissions at the Encinitas facility are from residents of Tri-City. The Encinitas facility is located nearby, but outside the Tri-City boundaries.

Scripps occasionally competes with Tri-City for patients.

ANALYSIS

Section 87100 of the Act prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. As a member of the Tri-City Hospital District, you are a public official under the Act. (Section 82048; Regulation 18700.)

Section 87103 provides:

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

³ Pursuant to our telephone conversation of February 15, 1996, concerning our request for additional facts, you indicated that your employment relationship is the same as that described in previous advice letters rendered to you, Bonagura Advice Letter, No. I-86-275 and Bonagura Advice Follow-up Letter, No. I-86-275. You also asked that we incorporate other facts included in these letters. We decline to incorporate, by reference, facts which may be pertinent only to your 1986 and 1987 requests. For example, the gross revenues of Scripps for 1986 are unlikely to be the same in 1996.

from its effect on the public generally, on the official or a member of his or her immediate family or on:

* * *

(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.

Section 87103(c).

Any person that has been a source of income to you of \$250 or more within the past 12 months is a potentially disqualifying economic interest as described in Section 87103. You are employed by Scripps, and have received more than \$250 from the hospital. Thus, Scripps is a source of income to you, and you may not participate in any governmental decision that will have a foreseeable and material financial effect on Scripps.

Foreseeability

Whether the financial consequences of a decision are reasonably foreseeable at the time a governmental decision is made depends on the facts of each particular decision. An effect is considered reasonably foreseeable if there is a substantial likelihood that it will occur. Certainty is not required. However, if an effect is only a mere possibility, it is not reasonably foreseeable. (In re Thorner (1975) 1 FPPC Ops. 198.)

You have stated that Tri-City is a competitor of Scripps and that the affiliation is being considered as a cost-savings measure for Tri-City and the other hospitals. The savings resulting from the decisions may manifest themselves in lower costs to patients, increased advertising, additional services, and a variety of other ways. Therefore, some of the affiliation decisions may have a financial effect on competitors such as Scripps, even if only five percent of the Scripps in-patient admissions are from residents of Tri-City. If there is a substantial likelihood that a Tri-City decision will have a financial effect on Scripps, we would deem the financial consequences of the decision to be reasonably foreseeable and you may not participate in the decision if the effect is material as discussed below.

Materiality

However, in order to be disqualified from the affiliation decisions, the effect of a particular decision on Scripps must

also be material. The Commission has adopted differing guidelines to determine whether the effect of a decision is material, based on the specific circumstances of each decision.

Regulation 18702.1(a) provides that where a source of income is directly before your agency as an applicant or the subject of the decision, the effect of the decision is deemed to be material and disqualification is required.

A source of income is directly before an agency when the source initiates the proceeding by filing an application, claim, appeal, or similar request, or is a named party in, or the subject of, the proceeding. A source of income is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person or business entity. (Regulation 18702.1(b).) Your facts do not indicate that Scripps will be directly affected by the affiliation decisions.

However, the Act also requires that public officials disqualify themselves from governmental decisions in which a source of income is indirectly involved if the decisions will materially affect the source of income. (Regulations 18702.2 and 18702.6.) With respect to nonprofit entities such as Scripps, Regulation 18702.5 (copy enclosed) provides different thresholds of materiality which apply depending on the financial size of the entity.

For example, if Scripps' gross annual receipts are more than \$100,000,000 but less than \$400,000,000, pursuant to Regulation 18702.5(b), the effect of the decision will be material if any of the following apply:

- (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 \$400,000 or more; or
- (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 \$100,000 or more; or
- (3) The decision will result in an increase or decrease in the value of the entity's assets or liabilities in the amount of \$400,000 or more.

Thus, if subdivision (b) of Regulation 18702.5 is the applicable subdivision, you may participate in the decision so long as an affiliation decision will not: (1) result in an increase or decrease of Scripps' gross annual receipts for a fiscal year in the amount of \$400,000 or more; (2) cause Scripps to incur or avoid additional expenses or to reduce or eliminate existing expenses for a fiscal year in the amount of \$100,000 or

more; or (3) result in an increase or decrease in the value of Scripps' assets or liabilities in the amount of \$400,000 or more.

Please note that the Commission does not act as the finder of fact in providing advice. (In re Oglesby (1975) 1 FPPC Ops. 71.) Thus, you must make the ultimate factual determination.

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: Luisa Menchaca
Counsel, Legal Division

Enclosure (Regulation 18702.5)

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.