



RAVI MEHTA
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July 25, 1996

Marvin J. Southard, D.S.W
Director
County of Kern
Mental Health Services Department
2151 College Avenue
Bakersfield, California 93305

Re: Your Request for Advice
Our File No. A-96-054

Dear Dr. Southard:

This letter is in response to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹

QUESTIONS

1) May you participate in decisions that have a direct financial impact on Desert Counseling Clinic (the "clinic") (i.e., making recommendations on funding proposals for which the clinic has applied), since Desert Counseling Clinic is a source of income to you?

2) May you participate in decisions that have an indirect financial impact on Desert Counseling Clinic (i.e., recommending an increase to children's funding for all clinics), since Desert Counseling Clinic is a source of income to you?

CONCLUSIONS

1) You may not participate in any of the funding decisions in which Desert Counseling Clinic is directly involved, as discussed below.

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.

2) You also may not participate in any decisions which will have an indirect material financial effect on Desert Counseling Clinic, as discussed below.

FACTS

You have been the Director of the Kern County Mental Health Department for the last three years, reporting to the Kern County Board of Supervisors. Your department provides services directly, and contracts with most of the private, nonprofit organizations in the field of mental health in Kern County to provide services to people with mental illness.

The county has had a mental health contract with Desert Counseling Clinic, a private nonprofit 501(c)(3), since 1979. On November 12, 1995, your wife, who is a licensed Marriage, Family and Child Counselor, was hired as a program supervisor by Desert Counseling. She supervises interns and case managers in the "On Site" program. Her salary is \$43,000 per year, plus fringe benefits. You had no involvement with her interview or hiring.

The Kern County Mental Health Department has partially funded the "On Site" program for eight years. Funding for "On Site" in fiscal year 1995-96 was \$429,352, out of a total mental health contract for Desert Counseling of \$2,952,353, approved by the Kern County Board of Supervisors on September 5, 1995.

Desert Counseling Clinic was a minor provider of substance abuse services prior to 1995; however, during 1995, the clinic merged with Kern County's two largest providers of substance abuse services so that current substance abuse contracts with Desert Counseling affiliates total over \$1,500,000. Kern County has extended the opportunity to all major mental health providers to increase services for children through the Early Prevention Screening, Diagnosis and Treatment ("EPSDT") funding. Desert Counseling's children's services were increased by \$305,000 to take advantage of this available funding on January 16, 1996. Some of these EPSDT funds may be assigned, by the contractor, to "On Site." Program allocations of EPSDT increases are being left to the discretion of the contract agencies. Two other major contractors, Henrietta Weill Memorial Child Guidance Clinic and Memorial Center for Behavioral Health, are participating in EPSDT funding and were approved by the Board of Supervisors on January 7, 1996.

As the director of the health department, you make recommendations to the Board of Supervisors concerning contracts and agreements. You have refrained from any decisionmaking or recommendations regarding children's programs or contracts for Desert Counseling Clinic; these matters are presently assigned to Deanna Cloud, Kern County Children's System of Care Administrator.

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.

Section 87103 specifies that a public official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from the 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.

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

* * *

Section 87103(c) and (d).

Nonprofit corporations are not "business entities" as defined in the Act. Section 82005 defines a "business entity" as any organization or enterprise operated for profit. However, nonprofit corporations, such as Desert Counseling Clinic, may still be "sources of income" as described in Section 87103(c). Thus, since your community property share of your wife's salary from Desert Counseling Clinic exceeds \$250 in the past 12 months, you may not participate in any decision that will have a reasonably foreseeable material financial effect on Desert Counseling Clinic.

A. 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 case. 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.) Thus, an official must determine, at the time of a decision,

whether a financial effect on an economic interest is substantially likely.

B. Materiality

For an economic interest to be disqualifying with respect to a specific decision, the decision must not only have a foreseeable financial effect on the economic interest, but that effect must also be material. The Commission has adopted various regulations which contain objective standards for determining whether the effect of a decision will be material, depending on the nature of the decision and economic interest. (Regulation 18702.)

1. Directly Involved

If a source of income is directly involved in a decision before the official's agency, Regulation 18702.1 (copy enclosed) provides that the effect of the decision automatically is deemed material. A source of income is directly involved in a decision when the source of income initiates the proceeding, is a named party in, or the decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the source of income. (Regulation 18702.1(b).)

Therefore, if Desert Counseling Clinic is an applicant for funding, it is directly involved in the decision before the mental health department and you would not be permitted to participate in decisions or recommendations concerning the funding.

2. Indirectly Involved

However, even if Desert Counseling Clinic is not directly involved in a decision, you will still be required to disqualify yourself if the decision will have an indirect and material financial effect on the clinic. Regulation 18702.5 (copy enclosed) sets forth the criteria to determine whether the indirect effect of a decision on a nonprofit entity is material. This analysis depends on the size of the entity as measured by its gross annual receipts, and the decision's effect on gross annual receipts, expenses and the value of assets or liabilities.

Since we do not have any facts regarding the gross annual receipts of Desert Counseling Clinic, please refer to Regulation 18702.5 and which subsection would apply to determine if a funding decision will have a material financial effect. You may not participate in any funding decisions which will have an indirect and reasonably foreseeable material financial effect on Desert Counseling Clinic.

Participation

The terms "making, participating in making, and influencing" have been broadly interpreted consistent with the policies and purposes of the Act.

1. **Makes a Decision**: A public official makes a decision if the official votes on a matter; appoints a person; obligates or commits the official's agency to any course of action; or, enters into any contractual agreement on behalf of the agency. (Regulation 18700(b), copy enclosed.)

2. **Participates in a Decision**: A public official "participates in the making of a governmental decision" when, acting within the authority of the official's position, the official negotiates, without significant substantive review, with a governmental entity or private person regarding the decision; or advises or makes recommendations to the decisionmaker, either directly or without significant intervening substantive review, by conducting research or making any investigation which requires the exercise of judgment on the part of the official and the purpose of which is to influence the decision; or preparing or presenting any report, analysis or opinion, orally or in writing, which requires the exercise of judgment on the part of the official and the purpose of which is to influence the decision. (Regulation 18700(c).)

3. **Influencing a Decision**: With regard to a governmental decision which is within or before an official's agency or an agency appointed by or subject to the budgetary control of the agency, the official is attempting to use the official's position to influence the decision if, for the purpose of influencing the decision, the official contacts, or appears before, or otherwise attempts to influence, any member, officer, employee or consultant of the agency. Attempts to influence include, but are not limited to, appearances or contacts by the official on behalf of a business entity, client, or customer. (Regulation 18700.1(a).)

With regard to a governmental decision which is within or before an agency not covered by subdivision (a), the official is attempting to use the official's position to influence the decision if, for the purpose of influencing the decision, the official acts or purports to act on behalf of, or as the representative of, the official's agency to any member, officer, employee or consultant of an agency. Such actions include, but are not limited to, the use of official stationery. (Regulation 18700.1(c).)


Appointing Ms. Cloud to handle matters relating to children's programs and contracts for the clinic is a governmental decision; however, that decision does not trigger a conflict of interest for you unless Ms. Cloud is a financial interest of yours. (Section 87103.)

In summary, if you have a conflict of interest you are prohibited from making, participating in making, or otherwise using your official position to influence a governmental decision. Therefore, you may not participate or influence Ms. Cloud or any other individual assigned to matters relating to the children's programs and contracts for Desert Counseling Clinic.

I trust this answers your questions.

Sincerely,

Steven G. Churchwell
General Counsel

By:  Jill Stecher
Counsel, Legal Division

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Enclosures