

RAVI MEHTA
CHAIRMAN



FAIR POLITICAL PRACTICES COMMISSION

October 30, 1996

Clayton Roche
Deputy Attorney General
50 Fremont Street, Suite 300
San Francisco, CA 94105-2239

RE: Your File No. 96-701
Our File No. G-96-239

Dear Mr. Roche:

This letter is in response to your request for our input on an opinion request from the Public Utilities Commission regarding Public Utilities Code section 303.

QUESTION

Public Utilities Code section 303 provides:

No person in the employ of or holding any official relation to any corporation or person that is subject in whole or in part to regulation by the commission, and no person owning stocks or bonds of any such corporation or who is in any manner pecuniarily interested therein shall be appointed to or hold office of commissioner or be appointed or employed by the commission. If any such person becomes the owner of such stocks or bonds or becomes pecuniarily interested in such corporation otherwise than voluntarily, his office or employment shall become vacant unless within a reasonable time he divests himself of such ownership or interest.

The Public Utilities Commission is now facing the following two fact patterns: a PUC employee is about to marry an employee of a regulated utility and a PUC employee has a spouse who is considering going to work for a regulated utility. The PUC is concerned that the broad language of section 303 could be interpreted to deny PUC employment to any employee who

marries or is currently married to a PUC employee. The PUC has requested whether section 303 may be interpreted so that a "pecuniary interest" would refer only to community property income. In that way, a PUC employee whose spouse is employed by a regulated utility could avoid a section 303 violation by an agreement which alters the employee's community property interest in the spouse's income and renders such property the separate property of the spouse.

CONCLUSION

We believe that the PUC's narrowing interpretation of section 303 is consistent with the intent and the provisions of the Political Reform Act. The following analysis is limited only to the Political Reform Act and does not include any interpretation of the Public Utilities Code or the marital property statutes.

ANALYSIS

The Political Reform Act prohibits a public official at any level of state or local government from participating in or influencing a governmental decision in which the official has a financial interest. (Section 87100.) The purpose for the conflict-of-interest provisions was to ensure that public officials would perform their duties in an impartial manner, free from bias caused by their financial interests. (Section 81001(b).) A public official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect on the official, on a member of the official's immediate family, or on any of the following: a) a business entity in which the official has an investment worth at least \$1,000; b) real property worth at least \$1,000; c) a source of \$250 or more in income received by the official within the past 12 months; d) a business entity in which the official holds a position; and e) a donor of a gift to the official of \$280 or more.¹ An investment interest includes an investment owned by the official's spouse. (Section 87103.)

An official may be disqualified from a decision materially financially affecting any of these economic interests regardless of the official's status within the agency. The PRA requires disqualification on a decision-by-decision basis. If the official is "participating" or "influencing" a governmental decision, the official must determine whether the decision will materially financially affect one of the official's above-described economic interests and then disqualify if necessary. (Title 2 Cal. Code of Regs. § 18700.)²

¹ Regulation 18940.2 sets the current gift limit, adjusted to reflect changes in the Consumer Price Index, at \$280.

² In defining the concept of participating in a governmental decision, Regulation 18700(d) specifically excludes actions that are "solely ministerial, secretarial, manual, or clerical."

Income, as defined in the PRA, includes “any community property interest in the income of a spouse.” (Section 82030(a).) Accordingly, an official is disqualified from a governmental decision materially financially affecting the official’s spouse’s employer if the official has a community property interest in the spouse’s income worth more than \$250. The PRA would prohibit a PUC employee from making a decision materially financially affecting a regulated utility if the employee had a community property interest worth \$250 or more in the spouse’s income from the regulated utility. Further, if the official’s spouse has an investment interest in the utility, such as stock or stock options, the official would have a potential conflict of interest regardless of whether the official has any community property interest in the investment. The official has a conflict solely by virtue of the spouse’s ownership of the investment, regardless of whether the employee has a community property interest in the investment.

The Commission has previously addressed the issue of spousal separate property income in formal advice letters.³ In 1986, a member of the State Water Resources Control Board requested advice because her spouse owned a lobbying firm and had several sources of income that could be affected by the board’s decisions. (Vassey Advice Letter, FPPC No. A-86-201.) The official and the spouse entered into a formal, recorded, separate property agreement. The spouse took steps at his lobbying firm to insulate himself from those clients of the firm who had interests before the board, although the spouse still received his share of income from those clients. In the letter, we concluded that the board member did have a potential conflict because her husband owned an investment interest in the firm worth more than \$1,000. As to the spouse’s income, however, we concluded that the board member had no community property interest in her spouse’s income. Therefore, the income could not be a source of conflict for the board member.

Similarly, in the Shaw Advice Letter, FPPC No. I-90-377 (an informal letter that did not provide the requestor with immunity), the requestor, a member of a planning commission, had a spouse who served as a consultant for an agency with matters before the planning commission. The commissioner and his spouse had a prenuptial agreement that dictated that the spouse’s income would remain separate property. As a result, the spouse’s consulting client was not a source of income to the public official.

This line of advice was consistent with the definition of income in the Act, which expressly limits spousal income to income in which the public official has a community property interest for conflict-of-interest purposes. (Gov. Code § 82030(a).) Any other interpretation would render the statutory language in section 82030(a), “any *community property* interest in the income of a spouse,” meaningless. (Emphasis added.)

³ Formal advice letters provide written advice with respect to the requestor’s duties under the Act. The advice is a complete defense in a Commission enforcement proceeding if the requestor provides all of the material facts regarding the situation.

Given the language and interpretation of "income" under the Act, it would be consistent with the intent of the PRA to interpret the "pecuniarily interested" language in section 303 to apply to spousal income only to the extent the public official has a community property interest in that income.

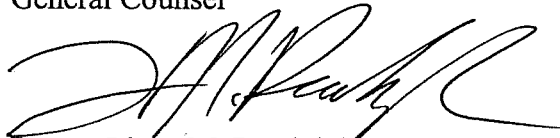
The PUC asked whether section 303 should be applied only to commissioners, administrative law judges, and other "designated employees." The broad language of section 303 indicates that it was not intended to apply only to employees designated in the conflict of interest code mandated by the PRA. Moreover, the PRA does not contain such a limitation for conflict-of-interest purposes and it would be somewhat misleading to apply section 303 only to employees designated in the PUC's conflict of interest code.

Although only designated employees are required to disclose their economic interests and are subject to the gift limit and the honoraria ban, the Act requires all employees, even non-designated ones, to refrain from participating in governmental decisions in which they have a conflict of interest. The purpose of creating designated employee categories in an agency's conflict of interest code is to identify decision-making employees. If an employee's duties change or are not properly identified in the code, the employee may begin making or participating in governmental decisions before he or she incurs filing obligations. Section 303 should be interpreted to apply to all employees at the PUC who engage in tasks other than ministerial, secretarial, manual, or clerical duties, regardless of whether they have been identified in the conflict of interest code. Interpreting section 303 in this manner would ensure that it would apply to all employees making or participating in making governmental decisions regardless of the disclosure categories in the PUC's conflict of interest code or the employee's civil service status. At the same time, it would limit section 303 only to decision-making employees.

We agree with the PUC's conclusion that the Political Reform Act applies to deter and prosecute any actual conflicts of interest. We also agree that the separate property approach should apply only to community property income. It would be consistent with the PRA and the apparent intent of section 303 to prohibit a PUC employee or the employee's spouse from owning an investment interest in a regulated utility.

Sincerely,

Steven G. Churchwell
General Counsel



By: Liane M. Randolph
Counsel, Legal Division