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FAIR POLITICAL PRACTICES COMMISSION

March 25, 1997

Richard Doyle
City Attorney
City of Concord
1950 Parkside Drive, M/S 08
Concord, California 94519-2578

**Re: Your Request for Advice
Our File No. A-97-071**

Dear Mr. Doyle:

This letter is a response to your request for advice on behalf of Concord City Councilmember Michael Pastrick regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹

QUESTIONS

1. Is State Senator Dan Boatwright a source of income to Councilmember Michael Pastrick if the councilmember received income from the senator's controlled campaign committee within the previous 12 months?
2. If Senator Boatwright is a source of income to Councilmember Pastrick, should the councilmember disqualify himself from a city council decision concerning a party which the senator will represent before the city council?

CONCLUSION

1. Yes, Senator Boatwright is a source of income to Councilmember Pastrick because the Act treats a candidate and his or her controlled committee as one person for conflict-of-interest purposes.
2. Councilmember Pastrick must disqualify himself from the decision if the decision will have a reasonably foreseeable material financial effect upon Senator Boatwright. The financial effect of the decision upon Senator Boatwright is reasonably foreseeable if the senator's fees are contingent upon the outcome of the city's decision.

¹ Government Code sections 81000 - 91014. Commission regulations appear at title 2, sections 18109 - 18995, of the California Code of Regulations.

FACTS

Michael Pastrick is a councilmember for the City of Concord. Beginning in 1981, he served as treasurer and provided various other campaign services as a paid consultant for campaign committees controlled by retired State Senator Dan Boatwright. Most recently he served as a treasurer and consultant for the Boatwright Senate 92 Committee ("Campaign Committee"). Senator Boatwright retired from the State Senate in December 1996, and the Campaign Committee has since been terminated. At all times during its existence, the Campaign Committee was controlled by Senator Boatwright and Councilmember Pastrick served as a treasurer and as a consultant at the pleasure of the senator. Councilmember Pastrick has received more than \$250 in income from the Campaign Committee during the past 12 months.

Senator Boatwright has recently been hired as an attorney to represent Concord Disposal Service in a rate setting and franchise extension matter currently before the Concord City Council. Concord Disposal Service has the exclusive franchise to haul garbage in the City of Concord. Every three years, the Concord Disposal Service is required to apply to the city council for a revision of current rates. Concord Disposal has also requested a 13-year extension to its franchise from the city council. You would like to know whether Councilmember Pastrick is disqualified from participating in city decisions concerning Concord Disposal's application for new garbage rates and/or franchise extension.

ANALYSIS

Section 87100 prohibits public officials from making, participating in making, or using their official position to influence a governmental decision in which they know or have reason to know they have a financial interest.

An official has a financial interest in a governmental decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, or on a member of the official's 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).)

The Campaign Committee has been source of income to Councilmember Pastrick of \$250 or more within the previous 12 months. At the time the councilmember received income from the Campaign Committee, Senator Boatwright controlled the Campaign Committee. Senator Boatwright will be representing a party before the Concord City Council. You would like to know whether Senator Boatwright is considered a source of income to Councilmember Pastrick for conflict-of-interest purposes.

In the past, for conflict-of-interest purposes, the Commission has “pierced” through entities to consider the nature of the relationship between a person and the entity.² For example, in *In re Nord* (1983) 8 FPPC Ops. 6, the Commission, in its conflict-of-interest analysis, pierced through the veil of a limited partnership and determined that the *controlling* general partner was one with the limited partnership. The Commission reasoned that a limited partnership involves an investment by the limited partners in the entrepreneurial skills of the general partner who has the *sole discretion and authority to manage the investment* when conducting the partnership business.

The same rationale applies to candidates and their controlled committees. Section 82016 defines a “controlled committee” as the following:

“[A] committee which is controlled directly or indirectly by a candidate or state measure proponent or which acts jointly with a candidate, controlled committee or state measure proponent in connection with the making of expenditures. A candidate or state measure proponent controls a committee if he, his agent or any other committee he controls has *significant influence on the actions or decisions of the committee.*” (Emphasis added.)

As expressed in the above definition, a candidate has *significant discretion* in connection with the making of expenditures by his or her controlled committee. (Section 82016.) Accordingly, we will treat a candidate and his or her controlled committee as one person for purposes of the conflict-of-interest provisions of the Act. Thus, Senator Boatwright is a disqualifying source of income to Councilmember Pastrick and the councilmember must not make, participate in making or attempt to influence a city decision if the decision will have a reasonably foreseeable material financial effect upon the senator.

Foreseeability

You want to know whether it is reasonably foreseeable that a city decision concerning a party represented by Senator Boatwright will financially affect the senator. This is a factual determination which Councilmember Pastrick must make, however, we can offer the following guidelines. Whether the financial consequences of a decision are reasonably foreseeable at the time a governmental decision is made depends upon 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. (*In re Thorner* (1975) 1 FPPC Ops. 198.) For example, it is substantially likely that Senator Boatwright will be financially affected by the decision if his fees are contingent upon the outcome of the decision.

² See, for example, *In re Lumsdon* (1975) 2 FPPC Ops. 140 and *In re Kahn* (1975) 2 FPPC Ops. 151 where the Commission pierced through the corporate veil and treated the *controlling* shareholder as one with his closely-held corporation.

Materiality

If Councilmember Pastrick finds that the financial effect of the city's decision upon Senator Boatwright is reasonably foreseeable, the councilmember must then determine whether the financial effect is material. The Commission has adopted a series of regulations that provide guidance regarding whether the financial effects of a decision are material. These regulations apply differing standards depending on whether the decision will directly³ or indirectly affect the official's financial interest. For an individual who is a source of income to an official, the indirect effect of a decision is material if:

“(a) The decision will affect the individual's income, investments, or other tangible or intangible assets or liabilities (other than real property) by \$1,000 or more; or

(b) The decision will affect the individual's real property interest in a manner that is considered material under Section 18702.3 or Section 18702.4.” (Regulation 18702.6.)

To determine whether the effect of the city decision on Senator Boatwright will be material, Councilmember Pastrick must assess the potential effect of the decision by applying the standards set forth above.

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Steven G. Churchwell
General Counsel



By: Julia Butcher
Graduate Assistant, Legal Division

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³ A source of income of an official is directly affected by a decision when the source of income initiates, is a party in, or is the subject of the decision. (Regulation 18702.1(b).)