

RAVI MEHTA
CHAIRMAN



FAIR POLITICAL PRACTICES COMMISSION

July 1, 1997

N. Gregory Taylor
Metropolitan Water District of Southern California
Box 54153
Los Angeles, California 90054

**Re: Your Request for Advice
Our File No. A-97-275**

Dear Mr. Taylor:

This letter is a response to your request for advice regarding the provisions of the Political Reform Act (the "Act").¹ Please bear in mind that nothing in this letter should be construed as evaluation of any conduct which may already have taken place. Further, this letter is based on the facts as they have been presented to us. The Commission does not act as finder of fact in providing advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

QUESTIONS

1. A director of the Board of the Metropolitan Water District of Southern California is appointed by the mayor of the city which she represents. The appointment is ratified by the city council. Who is the "person who made the appointment": the mayor; the entire city council; the city clerk (the city clerk may perform a ministerial role in the appointment); and/or candidates for any of these offices?²

2. A director is appointed by vote of the governing body of a city or special district for an indefinite term of office, at the pleasure of the governing body. The individuals on the governing body which appointed the director no longer serve as members. Are the current members of the governing body treated as the "person who made the appointment"?

3. A director is appointed by vote of the governing body of a city or special district for a

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

² We will assume that the procedure at issue in your first question differs from the procedure set forth in your questions 2 and 3. In other words, we are assuming that the "vote" referenced in questions 2 and 3 is an initial action giving rise to the appointment, not a "ratification" vote as may be contemplated by question 1.

four-year term of office. The director's term is almost expired and the director's re-appointment will come before the governing body. Are all of the current members of the governing body treated as the "person who made the appointment" even if some were not on the governing body at the time of the original appointment? Are candidates seeking election to the governing body also considered "the person who made the appointment"?

CONCLUSIONS

1. The "person who made the appointment" is the mayor.
2. The current members of the governing body would not be the "appointing persons," unless they engaged in reconsideration of the appointee.
3. To the extent that a re-appointment acquires all or most of the attributes of an initial appointment, the current members of the governing body would be "appointing persons." Candidates seeking election to the governing body would not be considered an "appointing person."

FACTS

The Metropolitan Water District of Southern California ("MWD") is a special district and quasi-municipal corporation formed pursuant to the Metropolitan Water District Act. MWD serves water on a wholesale basis to its 27 member agencies, all of whom are public bodies (cities, municipal water districts, and one county water authority) of the State of California. Metropolitan is governed by a 51-member board of directors, each of whom is appointed by the member public agency which the director represents on MWD's Board.³

At the option of the appointing member public agency, MWD board members either are designated and appointed by the chief executive officer of the appointing agency, with the consent and approval of the governing body of the agency, or are selected directly by the governing body, by majority vote. (MWD Act, § 51.) A board member may be selected for an indefinite term and continue to serve at the pleasure of the appointing agency, or may be appointed to a four-year term, subject to removal only for cause. (MWD Act, §§ 51, 54.)

As appointees to a public board, MWD's directors are subject to Section 85705 which was added to the Act by Proposition 208.

³ Under the MWD Act, each member agency is entitled to at least one representative (MWD Act, § 51), plus one additional representative for each full 3 percent of the assessed value within Metropolitan which is located within the territory of that member agency (MWD Act, § 52).

ANALYSIS

Section 85705 was added to the Act by Proposition 208, which became effective on January 1, 1997. The Commission has not yet had the opportunity to consider regulations that might assist with the interpretation and application of Section 85705. The Commission may adopt such regulations in the future, and the advice given in this and other letters may be superseded in whole or in part by subsequent regulations.

Through Section 85705, Proposition 208 created a new prohibition on contributions from governmental appointees to the officeholders who appointed them. Section 85705 provides as follows:

“No person *appointed* to a public board or commission or as Trustee of the California State University or Regent of the University of California during tenure in office shall donate to, or solicit or accept any campaign contribution for, any committee controlled by *the person who made the appointment* to that office or any other entity with the intent that the recipient of the donation be any committee controlled by such person who made the appointment.” [Emphasis added.]

Based on the language of the Section 85705, together with advice letters previously issued by this Office regarding this topic, I will address your specific inquiries concerning the application of this statute.

1. Mayor vs. ratifying City Council — who is the “appointing person”?

The Act defines the term “person” broadly to mean “an individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, company, corporation, limited liability company, association, committee, and any other organization or group of persons acting in concert.” (Section 82047.) Under this definition, “the person who made the appointment” in Section 85705 could be, under the facts of your question, *either* the mayor or the city council.

We have advised previously, that when a mayor appoints an individual subject to the concurrence or ratification of the city council, **only** the mayor is the “person who made the appointment” under Section 85705. (*Lyions* Advice Letter, No. A-97-203; *Abdelnour* Advice Letter, No. A-97-164.)⁴ Accordingly, for purposes of your first question (e.g., where a director is

⁴ In the *Lyions* Letter, *supra*, we stated,

“[W]e believe that Section 85705 requires that we determine which “person” (as between the mayor and the city council) actually makes the appointment, noting that the language of Section 85705 refers to the ‘the person who made the appointment’ in the singular. The language of Section 85705 does not contemplate application to a number of separate and distinct ‘persons’ simply because the appointment process is completed in two or more steps.... Although the appointment was made subject to ratification by the city council, nothing in Section 85705 would

appointed by the mayor of a city and ratified by the city council), the “appointing person” under Section 85705 would be the mayor; the appointees would not be prohibited from making contributions to the ratifying council members.

You also inquire in this letter whether the city clerk and candidates for the mayor, council member and city clerk positions would be considered “appointing persons” under Section 85705. As long as the city clerk merely performed ministerial tasks with respect to an appointment, the rationale which applied to the council members would apply to the city clerk. Candidates for all of the mentioned offices would not be considered “appointing persons” because they did not hold office at the time the appointment was made and did not participate in the appointment process. (See *Holland Advice Letter*, No. A-97-120a (under Section 85705, an incumbent with appointment power is not prohibited from receiving contributions from an appointee as long as the incumbent did not make the actual appointment of the appointee).)

2. Are current members of a city’s governing body the “appointing persons” with respect to an appointee serving an indefinite term?

You have asked whether current members of a city’s governing body, who were not members of that body at the time an appointment was made, are barred under Section 85705 from receiving contributions from the appointee who is serving an indefinite term.⁵ As we opined in the *Lyions Letter* (see footnote 3, *supra*), Section 85705 contemplates an act of appointment by a singular person or singular group of persons at a particular moment in time; we believe the intent of this Section was **not** meant to be a continuum extending to all persons serving in positions subsequent to the time an appointment was made. (See *Holland Advice Letter*, No. A-97-120a.) Additionally, given that the purpose behind Section 85705 is to prevent the appearance of impropriety and potential for corruption in campaign contributions (See *Moll Advice Letter*, No. A-97-161), this purpose is not served if the Section is read to apply to persons who had no actual involvement in the selection or appointment of a possible contributor. Therefore, current members of a governing body (who did not participate in the appointment process) are not “appointing persons” and are not included in the Section 85705 prohibition. Please be advised, however, that should the current members **reconsider** the appointment (your facts specify that an indefinite term appointee serves at the pleasure of the governing body), their acts may constitute a further appointment thereby giving rise to the Section 85705 prohibition. The determination of whether reconsideration equals a further appointment is a factual inquiry which cannot be answered based on the information provided in your letter.

warrant its application to a body whose role in the appointment process is limited to post hoc review.”

⁵ Presumably (as mentioned in footnote 2, *supra*), the “appointing person” under these facts is the governing body acting in the first instance and not acting to ratify the decisions of another.

3. Are current members of a city's governing body, who will vote on a re-appointment, "appointing persons"?

You indicate that a director has been appointed by a governing body for a four-year term. This term is about to expire and the governing body, consisting of some new members, will vote on the director's re-appointment. Your question is whether Section 85705 will apply to the governing body without regard to who participated in the original appointment.

As explained above, Section 85705 implies a process which is engaged-in by an identifiable person or group of persons; the Section then acts to protect the process by imposing restrictions which prevent the process from being corrupted by the appearance of impropriety and *quid pro quo*. To the extent a re-appointment acquires all or most of the attributes of an initial appointment (e.g., consideration of the merits of a person's selection, as opposed to an automatic act), the process contemplated by Section 85705 would be employed and the concerns relating to the appearance of impropriety and corruption would be triggered. Accordingly, a governing body engaging in a substantive consideration of a director's re-appointment would be the "appointing persons" and would be subject to Section 85705.

You also ask whether candidates seeking election to the governing body would be considered an "appointing person." For the reasons set forth above, the answer to this question would be no (i.e., candidates presumably have engaged in no process to consider an appointee and Section 85705 applies to the person or persons who appoint and not to the office).

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

Sincerely,

Steven G. Churchwell
General Counsel



By: Lisa L. Ditora
Staff Counsel, Legal Division

SGC:LLD:jlw