



FAIR POLITICAL PRACTICES COMMISSION

December 2, 1997

James F. Meade
Assistant County Counsel
County of Orange
10 Civic Center Plaza
Post Office Box 1379
Santa Ana, California 92702-1379

**Re: Your Request for Advice
Our File No. A-97-546**

Dear Mr. Meade:

This letter is in response to your request for advice on behalf of various Orange County officials¹ regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").²

QUESTIONS

1. May members of the Board of Retirement participate in decisions which will have the effect of increasing or decreasing their present or future retirement allowances?
2. May members of the Board of Supervisors participate in decisions which will have the effect of increasing or decreasing their present or future retirement allowances?
3. May the County Counsel and the County's Chief Executive Officer advise the Board of Supervisors and the Board of Retirement regarding decisions which will have the effect of increasing or decreasing the retirement allowances which the County Counsel and the CEO will receive in the future?

¹ The Orange County officials include Laurence M. Watson, County Counsel; Janice Mittermier, Chief Executive Officer; and the following members of the Retirement Board: Keith Concannon, Thomas N. Foxx, Thomas W. Wilson, Bruce Moore, John M.W. Moorlach, Christopher Street, Thomas Lightvoet, Michael Carmody, Mary Abbott; and the following members of the Board of Supervisors: Charles V. Smith, James W. Silva, Todd Spitzer, William G. Steiner, Thomas W. Wilson.

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

CONCLUSION

1-3. Yes. The Orange County officials may participate in such decisions since pension benefits are not a disqualifying financial interest under the Act.

FACTS

Your office represents the Orange County Board of Supervisors, the Orange County Board of Retirement, and the Chief Executive Officer of the County of Orange. These two Boards each have members who are also members, active or retired, of the Orange County Employees Retirement System ("OCERS"). The Chief Executive Officer ("CEO") and the County Counsel are active members of OCERS.

Government Code section 31520.1 requires that at least four of the nine members (and their alternates) of the Board of Retirement be members of OCERS. In addition, the statute requires that the county treasurer be a member of the Board of Retirement. In any county where the treasurer is appointed, her or she would be a member of OCERS. Where elected, the treasurer may "opt in" to OCERS.

In the wake of the Supreme Court's recent decision in the case of *Ventura County Deputy Sheriff's Association v. Board of Retirement of Ventura County* (1997) 16 Cal.4th 483, it will be necessary for both the Board of Supervisors and the Board of Retirement to make governmental decisions regarding the application of that court decision to the accounts and benefits of individual members of OCERS. These decisions may have the effect of increasing the allowances which the members of these Boards receive now or will receive in the future. These Boards will require staff advice from the CEO and the County Counsel.

You believe the officials who are members of OCERS will not be disqualified from participating in decisions regarding the recent Supreme Court case. However, you are concerned that the *Ide* Advice Letter, No. A-94-402 may be construed to reach a contrary conclusion.

ANALYSIS

Section 87100 prohibits a public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official knows or has reason to know he or she has a financial interest.

An 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 on, among other enumerated interests, any source of income of \$250 or more within 12 months before a governmental decision. (Section 87103(c).)

You are requesting advice on behalf of Orange County officials who are members of OCERS, which is a public employees retirement system. You would like to know whether these officials are disqualified from participating in governmental decisions that will have the effect of increasing or decreasing their present or future retirement allowances.

Section 82030(b)(2) exempts from the definition of "income" any salary or per diem received from a local government agency. In a formal opinion, the Commission concluded that public sector retirement benefits are also exempt from the definition of "income." (*In re Moore* (1976) 3 FPPC Ops. 33.) The Commission reasoned that a pension is essentially a type of deferred salary whereby an employee agrees to receive a smaller payment while working in exchange for the security of receiving the remaining portion of his or her compensation after the employee retires.

Thus, it does not appear that the Orange County officials will have a disqualifying financial interest in the decisions concerning retirement allowances. However, you are concerned that our advice in the *Ide* Advice Letter, No. A-94-402 may lead to a different conclusion. In that letter, we advised that a member of the Orange County Water District Board of Directors could participate in the decision to restore pension plan funds lost by bad investment only if the decision would not materially affect his or her retirement benefits in an amount of \$250 or more. Our conclusion was based on language contained in Regulation 18702.1, which provides that the effect of a decision is material if the decision will result in the personal expenses, income, assets or liabilities of the official increasing or decreasing by at least \$250 in any 12-month period. (Regulation 18702.1(a)(4).)

Regulation 18702.1 was subsequently amended to provide:

"(c) Notwithstanding subdivision (a) an official does not have to disqualify himself or herself from a governmental decision if:

(1) The decision only affects the salary, per diem, or reimbursement for expenses the official or his or her spouse receives from a state or local government agency"

In a memorandum to the Commission regarding the amended version of regulation 18702.1, the *Ide* Advice Letter was expressly superseded. (Staff Memorandum, *Adoption of Proposed Amendments to Regulation 18702.1*, dated Sept. 25, 1995.)

Accordingly, we conclude that the Orange County officials do not have a disqualifying financial interest in the decisions applying the recent Supreme Court case.

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 Legal Assistant, Legal Division

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