



FAIR POLITICAL PRACTICES COMMISSION

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May 29, 1998

Paul E. Rainey
Associate Dean
College of Engineering
California Polytechnic State University
San Luis Obispo, California 93407

**Re: Your Request for Advice
Our File No. A-98-101**

Dear Dr. Rainey:

This letter is in response to your request for advice regarding the travel payment, honorarium, and disclosure provisions of the Political Reform Act (the "Act").¹

QUESTIONS²

1. In your position as Associate Dean for the College of Engineering of the California Polytechnic State University ("Cal Poly"), you may be asked to review proposals for the National Science Foundation ("NSF"). Are you prevented by the Act from accepting air fare, per diem, and payments from NSF to perform these reviews? If you are not prevented from accepting these payments, how will the payments be disclosed on your Form 700, Statement of Economic Interests?

2. In addition, you are planning to teach a course through Cal Poly's Extended Education Program for P G & E Diablo Canyon Power Plant. Does the Act permit you to teach this course for pay and, if so, how do you disclose these payments on your Form 700, Statement of Economic Interests?

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

² These revised questions are based on our telephone conversation of April 15, 1998.

CONCLUSIONS

1. You are not prevented by the Act from accepting air fare, per diem, and income from NSF to perform these reviews. Only the income received from NSF will be reportable on the Form 700, Statement of Economic Interests, if the aggregate payment meets or exceeds \$250.

2. Nothing in the Act precludes you from teaching the course through Cal Poly's Extended Education Program for pay, however, the payments received from teaching the course will be disclosable on the Form 700, Statement of Economic Interests.

FACTS³

You are Associate Dean for the Cal Poly College of Engineering. You have been asked in the past and may be asked in the future to review proposals for the National Science Foundation ("NSF") in Washington, D. C. NSF pays its reviewers' airplane fare, per diem, and about \$100-150 per day stipend. NSF is an independent agency of the United States government established by the National Science Foundation Act of 1950 to "promote the progress of science; to advance the national health, prosperity, and welfare; and to secure the national defense."⁴ One of its functions is to determine the total amount of federal money received by universities and appropriate organizations for conducting scientific and engineering research and construction of facilities where such research is conducted. NSF channels money and equipment to appropriate universities based upon proposals submitted by the universities. You believe that the basis on which you have been chosen in the past and may be chosen in the future to review such proposals derives from your experience and expertise in this area. It is an NSF requirement that you recuse yourself from reviewing any proposal pertaining to Cal Poly.

You are also planning to teach a course in the fall of 1998 through Cal Poly's Extended Education Program for the P G & E Diablo Canyon Power Plant ("P G & E"). You will teach this course in the evening at the power plant location and use vacation time documented in your personnel file to do so. The facts behind this arrangement are that P G & E wishes to give its Diablo Canyon Power Plant employees opportunities to earn degrees from courses they take in the evening at the power plant location. The actual degrees earned by the P G & E employees are received from Regents College of New York which accepts credits the employees receive from the Cal Poly Extended Education Program.

³ This statement of facts is based on your letter dated March 25, 1998, and our telephone conversations of April 15, 1998, May 4, 1998, and May 21, 1998.

⁴ This quote and information about the activities undertaken by NSF are from the NSF mission statement found at their Internet web site <http://www.nsf.gov/home/about/creation.htm>.

P G & E contracts with the Extended Education Program to provide the courses. The Extended Education Program then approaches faculty members at Cal Poly to teach the course. The faculty member who is approached to teach signs a contract with the Extended Education Program to teach the course and to receive one-third of the payment for teaching the course as additional regular salary. The remaining two-thirds, which has been paid by P G & E and put by Extended Education into the State General Fund, is paid on a contract basis without federal and state withholdings. You will ultimately receive two checks: your regular paycheck, with the additional amount from the university with your salary, *and* another check issued by the State of California.

ANALYSIS

The Payment, Per Diem, and Air Fare From NSF

1. The Payment

Section 89502(c) provides that no designated employee of a state agency shall accept any honorarium from any source if the employee would be required to report the receipt of income from that source on his or her Statement of Economic Interests. Section 89502(b) generally defines honorarium as ". . . any payment made in consideration for any speech given, article published, or attendance at any public or private conference, convention, meeting, social event, meal or like gathering." In our telephone conversation, you stated that reviewing proposals for NSF involves sitting in a group with other reviewers and discussing the merits of each proposal. From the facts presented, it is apparent that the payment for your work reviewing proposals does not meet the definition of "honorarium," because discussing and reviewing proposals is not merely making a speech, writing an article or attending meetings. (*Fessler* Advice Letter, No. I-93-408; Regulation 18931.3.) On these grounds, we conclude that the payments you will receive in connection with this work are not honoraria.

As discussed above, rather than analyze the payments received from NSF as honoraria, we will consider the compensation you receive for reviewing proposals as being in the nature of income. (Section 82030.) As a designated employee of a state agency, Cal Poly, the disclosure category assigned to you in the California State University conflict of interest code requires you to report sources of income which "contract with the campus to provide supplies, materials, including books and periodicals, equipment, services or work of the type utilized by the school." In providing money and equipment pursuant to proposals submitted by Cal Poly, we think that NSF would be the type of entity intended to be covered by Cal Poly's conflict of interest code. Hence, NSF is a reportable source of income. NSF is a governmental entity and salary which is received from a state, local, or federal governmental agency is exempted from the definition of "income" for purposes of the Act by section 82030(b)(2). However, the term "salary" is not applied by the Commission to payments received in situations where the recipient is not an employee of the agency, but instead receives the payments under a contract. (*Riddle* Advice

Letter, No. A-97-294, and *Soldani* Advice Letter, A-94-042.) Therefore, the payment made to you by NSF will be considered reportable income and, if the aggregate total is \$250 or more, must be disclosed in your Statement of Economic Interests on Schedule C-Income and Business Positions. Also, to the extent that it is likely to occur, since the payment is income, the Act's conflict-of-interest provisions (see sections 87100 and 87103, copies enclosed), will preclude you for 12 months after receipt of the payment from making, participating in or using your position with Cal Poly to influence government decisions which will have a reasonably foreseeable and material financial impact, distinguishable from its effect on the public generally, upon NSF.

2. The Travel and Per Diem

Payments for travel, lodging, and per diem are treated separately from honoraria under the Act and are generally classified into the categories of "gift" or "income." "Income" is broadly defined in section 82030 to include virtually any payment received where consideration of equal or greater value is provided to the source of the payment. Any reimbursement for travel and lodging paid to you by NSF appears to be "income," a payment to you for which you provide full consideration in the form of reviewing proposals. There is no exact formula to determine whether consideration of equal or greater value has been provided. Ultimately, the official has the burden of proving that the consideration provided was of equal or greater value than the payment received. (Section 82028.) The value of services rendered may be proven by evidence as to the customary rate of compensation for such services, irrespective of official status. (*Matulich* Advice Letter, No. I-97-304, and *Allen* Advice Letter, A-96-181.) Also relevant in the determination might be the length of time spent rendering the services, or whether the services are of the type not readily available from others. (*Allen* Advice Letter, A-96-121.)

Based upon the facts you have provided, it appears that you will provide consideration of equal or greater value to NSF. Therefore, unless an exception applies, the payment of travel and per diem by NSF will be considered income. However, under section 82030(b)(2), reimbursement for travel expenses and per diem paid by a state, local, or federal government agency is not considered to be income for purposes of the Act. Therefore, the payment will *not be disclosable* as income on your Statement of Economic Interests.

Payments for Teaching in the Extended Education Program

The Act does not prohibit you from teaching the course through the Extended Education Program for P G & E, but it triggers possible prohibitions and disclosure requirements concerning the payments received. As discussed above, section 89502(c) provides that no designated employee of a state agency shall accept any honorarium from any source if the employee would be required to report the receipt of income from that source on his or her Statement of Economic Interests. However, section 89501(b)(1) provides that the term

“honorarium” does not include earned income⁵ for personal services rendered in connection with the practice of a bona fide business, trade, or profession. Regulation 18932.2 provides that a person is

“[P]resumed to be engaged in the bona fide profession of teaching in any of the following circumstances:

(a) The individual is under contract or employed to teach at a school, college, or university accredited approved or authorized as an educational institution by an agency of the State of California; or by an agency of any other state in the United States; or by an agency of the Federal government; or by a bona fide independent accrediting organization.

(b) The individual receives payment for teaching a course, presented to assist in maintenance or improvement of professional skills or knowledge where the course provides credit toward continuing education requirements of the pertinent profession.”

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(Regulation 18932.2.)

Cal Poly is an accredited educational institution and the courses solicited by P G & E under the Extended Education Program are solicited in order to improve the professional skills of their employees. On that basis, the requirements specified in these two subdivisions of Regulation 18932.2 are met and the payments are not prohibited honoraria.

The next issue is whether these payments are disclosable income. As discussed above, section 82030 defines the term “income” for the purposes of the Act. Subdivision (a) of section 82030 includes in this definition payments in exchange for equal or greater consideration. Accordingly, payments received by you in connection with the Extended Education Program would normally be included in this definition.

In your presentation of the facts over the telephone, you stated that part of your payment for teaching the Extended Education courses would be salary from Cal Poly, but that you would

⁵ “Earned income” means income from wages, salaries, professional fees, and other amounts received or promised to be received as compensation for personal services rendered. (Section 82030.5.)

sign a contract for the rest, and it would be paid to you separately as an independent contractor. As stated above, salary paid by a state, local, or federal government agency is not included within the definition of income under the Act. (Section 82030(b)(2).) Therefore, the amount of the payment paid to you in your normal salary from Cal Poly would be "government salary" exempt from the Act's definition of "income." However, as also stated above, the exception in section 82030(b)(2) does not apply to payments received as an independent contractor. (*Riddle*, supra, and *Soldani*, supra.) Therefore, the payments made separately to you as an independent contractor under the Extended Education Program would be income under the Act.

The income received by you as an independent contractor teaching the course for Extended Education may be disclosable income on your Statement of Economic Interests. This depends on the scope of the disclosable income category assigned to you by the California State University conflict of interest code. The disclosure category assigned to you requires you to report sources of income of \$250 or more which "contract with the campus to provide supplies, materials, including books and periodicals, equipment, services or work of the type utilized by the school."

We next consider who is the source of the income you receive as an independent contractor and whether or not the income is reportable on your Statement of Economic Interests. The facts you have provided indicate that P G & E is providing the money directly for this program. This would appear to differ from the usual activities of a state university where general government revenues are appropriated to support the university's functions. Among these functions are choosing appropriate courses and curricula. Here, a private source, P G & E, is choosing the specific courses to be taught and paying for the university's services in providing the courses. Thus, under these facts, we find that P G & E would be the source of income to you for monies you receive as an independent contractor under the Cal Poly Extended Education program. Since P G & E will be a source of income of \$250 or more to you and falls within your disclosure category definition of a source which "contract[s] with the campus to provide supplies, materials, including books and periodicals, equipment, services or work of the type utilized by the school," P G & E will be a reportable source of income on your Statement of Economic Interests.

In addition, as noted, public officials, such as you, are prohibited from making, participating in making, or using their official positions to influence governmental decisions in which they have a financial interest. (Section 87100.) Among other things, a public official is deemed to have a financial interest in a government decision if it is reasonably foreseeable that the decision would have a material financial effect on a source of income to the official of \$250 or more within 12 months prior to the making of the decision. Therefore, if the portion of your income as an independent contractor under the Cal Poly Extended Education program is \$250 or

more within a 12 month period, depending on the circumstances, you may be precluded from making, participating in making, or using your official position to influence decisions you make in your official capacity if they have a reasonably foreseeable material financial impact on P G & E.⁶

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

Sincerely,

Steven G. Churchwell
General Counsel



By: Adriane Korczmaros
Staff Services Analyst
Technical Assistance Division

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⁶ Regulations 18702.1 and 18702.2 (copies enclosed) set forth the criteria to determine whether or not a governmental decision has a material financial effect on a source of income.