



FAIR POLITICAL PRACTICES COMMISSION

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January 26, 1999

Marguerite P. Battersby
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1839 Commercenter West
Post Office Box 6425
San Bernardino, California 92412

**Re: Your Request for Advice
Our File No. A-98-316**

Dear Ms. Battersby:

This letter is in response to your request for advice on behalf of Councilmember Timmer regarding the provisions of the Political Reform Act (the "Act").¹

QUESTIONS

1. May Councilmember Timmer participate in any decision regarding a possible contract for fire protection and paramedic services considering that Councilmember Timmer's employer, the California Department of Forestry, will be competing for the contract?

2. If Councilmember Timmer takes a position with the California Department of Forestry as a Ranger II/Division Chief, how would his duties be limited under the Act?

CONCLUSIONS

1. Yes. Councilmember Timmer may participate in any decision regarding a contract for fire protection and paramedic services since any decision regarding that contract will not lead to a disqualifying conflict of interest. See Analysis below.

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

2. Councilmember Timmer, whether a Ranger II/Division Chief or in his current position, could not make, participate in making, or otherwise use his official position to influence a governmental decision that would have a material financial effect on him, his immediate family, or any of his economic interests, including any source of income. See Analysis below.

FACTS

The City of Highland ("city") is in the process of detaching from the San Bernardino County Service Area 38 ("CSA 38"), which provides fire protection and paramedic services in the county, and within the city. These proceedings are conducted by the Local Agency Formation Commission following an application by the city for reorganization, made pursuant to Government Code Sections 56000 et seq. Currently, CSA 38 contracts with the California Department of Forestry ("CDF") for fire protection and paramedic services. However, CSA 38 is in the process of a county-wide reorganization, and it is anticipated that the CDF contract will ultimately be terminated. Therefore, if the city-initiated detachment does not take place, fire protection and paramedic service will be provided in the future by the county fire department rather than by CDF.

If the city detaches from CSA 38, the city will be required to provide fire protection and paramedic services within the detached area (the city's incorporated boundaries). These services will be funded primarily (if not entirely) by property tax and special tax revenues. It is assumed that the city will contract with another agency or private firm(s) for the provision of these services, although no formal decision has been made by the city council in this regard. CDF has provided a preliminary proposal for these services, which the city will likely review, together with other proposals, once the detachment is confirmed.

Councilmember Timmer is currently a Battalion Chief; employed by CDF, and presently assigned to the West and Central Valley Battalion in San Bernardino County, which includes the Highland area of CSA 38 under contract between CSA 38 and CDF. The termination of the CDF contract by CSA 38, or the failure of the city to contract with CDF for city services after detachment will not affect his employment or his employment status, because of his seniority with CDF. However, should the city ultimately determine to contract with CDF for fire protection and paramedic services, he may be the beneficiary of additional compensation that he might otherwise not receive.

If the city contracts with CDF for fire protection and paramedic services, the Fair Labor Standards Act ("FLSA") mandates that CDF Battalion Chiefs be given additional compensation of approximately \$800 per month over the four-month, non-fire season (January through April), as part of the contract. Assuming that he retains his position as Battalion Chief, Councilmember Timmer would not receive this additional compensation absent the city contract. Thus, if the city's detachment is successful and if the city determines to contract with CDF for fire protection and paramedic services, the city contract with CDF would likely result in additional FLSA

compensation to Councilmember Timmer. As a state employee, Councilmember Timmer has neither influence nor control over the terms of local jurisdiction contracts offered by CDF to local jurisdictions.

In addition, Councilmember Timmer wishes to explore an employment opportunity, also with CDF, which would result in his promotion to the position of Ranger II/Division Chief, headquartered at the Prado Conservation Camp in Chino, San Bernardino County. This position would be funded entirely by the State of California and no city funds would be involved. If promoted, Councilmember Timmer's responsibilities would include supervision of the Battalion Chief of the city, although he would not be the designated "Fire Chief" of the city. You are aware of and are currently reviewing potential incompatibility of office issues relative to the possible promotion.

The city's application for detachment from CSA 38 will be heard by the Local Agency Formation Commission, and a decision is expected in March 1999. The city council has not, at this time, considered the issue of contracting for fire protection and paramedic services other than to receive preliminary service proposals for the purpose of responding to cost issues required in the reorganization proceedings (to determine whether the city will have the financial ability to undertake responsibility for the service assumed). As the detachment proceedings move forward, the city will need to be exploring the service provider issue in greater depth. More urgently, Councilmember Timmer will need to decide whether to apply for the promotion discussed above within the next month. The Commission's direction with respect to Councilmember Timmer's obligations under the Act will form the basis of his employment decision and his participation in this process.

ANALYSIS

I. Introduction of the General Rule Regarding Conflicts of Interest

The Act was voted into law by the people of the State of California, in part, to ensure that public officials perform their duties in an impartial manner, free from bias caused by their financial interests. (Section 81001.) To accomplish this goal, Section 87100 of the Act provides:

"No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest."

A public official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public

generally,² on the official, a member of his or her immediate family, or on any of six economic interests delineated in Section 87103 and provided here:

“(a) Any business entity in which the public official has a direct or indirect investment worth one thousand dollars (\$1,000) or more.

(b) Any real property in which the public official has a direct or indirect investment worth one thousand dollars (\$1,000) or more.

(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.

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

(e) Any donor of, or any intermediary or agent for a donor of, a gift or gifts aggregating two hundred fifty dollars (\$250)³ 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....”

- A. *Councilmember Timmer is a Public Official***
B. *Councilmember Timmer is Making/Participating in Making/Influencing a Governmental Decision*

Councilmember Timmer is a public official. (Section 82048.) If Councilmember Timmer votes on a matter, he is making a governmental decision. See Regulations 18702.1-18702.4⁴ (copies enclosed) for definitions of when a public official is making, participating in the making, or using his or her official position to influence a governmental decision.

- C. *Councilmember Timmer's Relevant Economic Interests***
1. *Councilmember Timmer does not have an economic interest in the CDF.*

Councilmember Timmer is employed by the CDF and, presumably, receives \$250 or more in salary from the CDF. Pursuant to Section 87103(c), a public official has an economic

² The public generally exception does not apply to your situation. See Regulation 18707.

³ This amount is adjusted for inflation and is currently at \$300.

⁴ Please note that the conflict of interest regulations were reorganized in November 1998. There were no substantive changes to the law.

interest in any source of income of \$250 or more. However, the Act's definition of income specifically excludes salary from a state or local government agency. (Section 82030.) Therefore, Councilmember Timmer does not have an economic interest in the CDF.

2. Personal Financial Effect

As noted above, a public official may not participate in a decision that will have a material financial effect on the public official or his or her immediate family, or, in other words, a public official may not participate in any decision that will have a "personal financial effect" on the public official. (Section 87103.) Regulation 18703.5 states:

"A governmental decision has a personal financial effect on a public official if the decision will result in the personal expenses, income, assets or liabilities of the official or his or her immediate family increasing or decreasing."

You mention that Councilmember Timmer may receive an increase in income as a result of a contract between the city and CDF. Therefore, we must determine if it is "reasonably foreseeable" that any personal financial effect on Councilmember Timmer will be "material."

D. Identifying the Applicable Materiality Threshold

E. Determining Whether it is Reasonably Foreseeable that the Materiality Threshold Will be Met

To determine whether it is reasonably foreseeable that a decision will have a material financial effect, the applicable materiality threshold must be determined. The exact threshold depends on the type of economic interest involved in the decision and whether the economic interest is directly or indirectly involved in the decision. Once the precise materiality threshold is determined, we must determine if it is reasonably foreseeable that the materiality threshold will be met. An effect is reasonably foreseeable if there is a *substantial likelihood* that it will occur. (Regulation 18706.) The Commission is not the finder of fact when providing advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

1. Personal Financial Effect

Pursuant to Regulation 18704.5, a public official is deemed to be directly involved in any decision that will have a personal financial effect on the public official. Regulation 18705.5 states that a reasonably foreseeable personal effect is material if it is at least \$250 in any 12-month period. However, Regulation 18705(c) states that, notwithstanding Regulations 18705.1 through 18705.5, an official does not have to disqualify himself or herself from a governmental decision if:

“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. This subdivision does not apply to decisions to hire, fire, promote, demote, or discipline an official’s spouse, or to set a salary for an official’s spouse which is different from salaries paid to other employees of the spouse’s agency in the same job classification or position.” [Emphasis added.]

F. Conclusion

Since any decision regarding a potential contract between the city and the CDF will only affect Councilmember Timmer’s salary from the CDF, a state government agency (see italicized language above), he may participate in any such decision unless there is some other personal effect on him. (*Souza* Advice Letter, No. I-92-615.) Therefore, he may participate in any decision involving the potential contract between the city and the CDF. Councilmember Timmer does not have to determine whether any financial effect is reasonably foreseeable since any change to his salary from CDF will not lead to a disqualifying conflict of interest.

As you have suggested, Councilmember Timmer may want to determine whether his current position or the Ranger II/Division Chief position could lead to a problem under the city’s or CDF’s statement of incompatible activities. (Government Code Sections 1126 and 19990.) In addition, you may want to refer to Government Code Section 1090. However, these statutes are outside of the Commission’s jurisdiction and we cannot provide advice regarding those statutes.

Finally, you have asked whether we can foresee any potential problems under the Act if Councilmember Timmer were to be promoted to Ranger II/Division Chief. Nothing in the Act would prohibit Councilmember Timmer from accepting the promotion. Absent a specific factual situation, it is impossible for us to comment on any potential problems that may arise if he gains such a promotion. We note that the normal conflict of interest rules would apply to him whether he holds his current position or gains a new position. Therefore, whether a Ranger II/Division Chief or a Battalion Chief, he cannot make, participate in making, or otherwise use his official position to influence any governmental decision⁵ that would have a material financial effect on him, his immediate family, or any of his economic interests, including any source of income.

⁵ Please note that the conflict of interest rules apply to any decisions Councilmember Timmer makes in his capacity as an employee of the CDF.

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

Sincerely,

Steven G. Churchwell
General Counsel

A handwritten signature in black ink, appearing to read "Marte Castaños", with a stylized, flowing script.

By: Marte Castaños
Staff Counsel, Legal Division

SGC:MC:tls