



FAIR POLITICAL PRACTICES COMMISSION

P.O. Box 807 • 428 J Street • Sacramento, CA 95812-0807

(916) 322-5660 • Fax (916) 322-0886

March 26, 1999

John P. Powell, Jr.
Peter Rabbit Farms
85810 Grapefruit Boulevard
Coachella, California 92236

**Re: Your Request for Advice
Our File No. A-99-040**

Dear Mr. Powell:

This letter is in 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 the finder of fact in providing advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

QUESTION

Are payments made to and for you as a result of your attendance at meetings of the National Advisory Council on Migrant Health prohibited honoraria?

CONCLUSION

The payments are not prohibited, limited or reportable on your 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.

FACTS

You have been elected to the Coachella Valley Water District Board of Directors.² The district has informed you that your position involves management of public investments.

You are also a member of the National Advisory Council on Migrant Health ("NACMH"), appointed by the Secretary of Health and Human Services, Ms. Donna Shalala, in or about September 1997. As a member of NACMH, you attend 2-3 meetings per year. You are paid \$200 per day for attending these meetings, plus a per diem for meals (\$46.00 per day pursuant to the Federal Travel Regulations). Hotel and travel arrangements for the members of the council are made and paid for by Professional and Scientific Associates, Inc. ("PSA"), which contracts with the Health Resources and Services Administration to provide logistical support for the NACMH. PSA also handles the payment of the \$200 meeting payment (referred to as an "honorarium" payment in the correspondence from PSA included in your request for advice) and the reimbursements for ground transportation, parking, tolls and meal per diems. According to the PSA correspondence, "reimbursement payments will be mailed by PSA within approximately 30 working days from the government's acceptance of [the member's] correctly completed original [reimbursement] form."³

You are considered a special government employee. Under 18 U.S.C. § 202(a), a special government employee ("SGE") is an officer or employee in the executive branch of the federal government who is appointed to perform temporary duties, with or without compensation, for a period not to exceed 130 days during any period of 365 consecutive days. As a SGE, you are subject to the Ethics in Government Act, amended by the Ethics Reform Act of 1989, and the criminal conflict of interest statutes of title 18 of the United States Code.

The NACMH, authorized under 42 U.S.C. § 218 and section 217 of the Public Health Service Act, advises, consults with, and makes recommendations to the Secretary of Health and Human Services ("HHS") and to the Administrator, Health Resources and Services Administration, concerning the organization, operation, selection, and funding of migrant health centers and other entities under grants and contracts under section 329 of the Public Health Service Act ("PHSA").

The NACMH consists of fifteen members who are appointed by the Secretary of HHS to serve four year terms. Twelve members are from governing boards of migrant health centers and

² You do not state the date of your election. In responding to your request, we will assume you were elected recently and have not yet been required to file a statement of economic interests.

³ Pursuant to a telephone message you left for me on March 19, 1999, I understand that the federal government is the source of the payments to you (relating to the NACMH meetings) and that PSA is simply a conduit for the delivery of those payments.

other entities assisted under section 329 of the PHSA. Of these twelve members, nine are being served by these health centers or grantees and are familiar with the delivery of health care to agricultural migrant and seasonal workers. The remaining three members are individuals who are qualified by training and experience in the medical sciences or in the administration of health programs. In your request for advice, you do not indicate your particular expertise concerning migrant health care.

ANALYSIS

Payments made to or on behalf of public officials (other than contributions) is income.⁴ (Section 82030.) The Act defines and provides for certain types of income more specifically: income may be a gift or it may be an honorarium. (Section 82028 and Section 89501(a).) Under the Act, public officials are prohibited from accepting honoraria. (Section 89502(a).) Gifts to public officials may be reportable and/or limited. (See Section 89503 and Section 87207.) Income is generally reportable although the Act does exclude from disclosure specific kinds of income or income from particular sources. Section 82030(b) itemizes the kinds of income that is excluded from disclosure. Specifically, subdivision (b)(2) excludes:

“Salary and reimbursement for expenses or per diem received from a state, local, or federal government agency and reimbursement for travel expenses and per diem received from a bona fide nonprofit entity exempt from taxation under Section 501(c)(3) of the Internal Revenue Code.”

You have written to inquire whether the payments you receive (or are made on your behalf) as a result of your attendance at meetings of the NACMH are prohibited or reportable under the Act.

The answer to this question rests on your status as a federal employee. As a member of the NACMH, you are designated and treated for all purposes as a SGE under title 18 of the

⁴ The Coachella Valley Water District is a local government agency (see *Kuhs* Advice Letter, No. A-96-063). As an elected member of its board of directors, you are a public official, and thus, this analysis is pertinent to you. (Section 82048.)

United States Code.⁵ Thus, the payments you receive (or are made on your behalf) constitute an employee salary or reimbursement of employee expenses.⁶

These payments are not gifts to you since, as an employee, you provide equal to or greater consideration for the salary and reimbursement payments you receive. (See Section 82028.) Similarly, your status as an employee renders the services you provide in conjunction with the NACMH meetings compensable employment activities, payment of which does not result in receipt of honoraria.⁷

As income, the salary payments and reimbursement of expense payments are not prohibited or limited under the Act. Are they, however, reportable?

The answer to this question is no. Even though the payments you receive in consideration for your attendance at the meetings of the NACMH are generically defined as "income," Section 82030(b)(2) excludes from the Act's purview "[s]alary and reimbursement for expenses or per diem received from a ... federal government agency"⁸ Based on the information you have provided to us, the source of the payments to you as a SGE is the federal government even though the payments are either made through or by PSA.⁹ Therefore, the

⁵ While we do not have every detail evidencing your relationship with the NACMH, we conclude that because you are specifically designated a SGE by the federal government, are subject to certain requirements of title 18 and other federal employment laws, and perform your duties as a member of the NACMH pursuant to the direction and control of the NACMH (and/or other federal agencies with which it is affiliated), you are an employee of the federal government and not an independent contractor. (*Fireman's Fund Ins. Co. V. Davis* (1995) 37 Cal.App.4th 1432 at 1442: "the principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired.")

⁶ Specifically, the \$200 you receive for each meeting attended is salary while the per diem and travel/lodging payments are reimbursement of expenses.

⁷ Even in the non-employment context, the term "honorarium" does not include "earned income for personal services which are customarily provided in connection with the practice of a bona fide business, trade or profession" (Section 89501(b)(1); see also *Fessler* Advice Letter, No. I-93-408.) You have not provided us with a description of your duties as a member of NACMH nor have you explained your professional relationship to migrant health care. If the facts of your situation would meet the exception of Section 89501(b)(1), the \$200 meeting payments you receive may not be honoraria even if you were not a SGE.

⁸ Your status as an employee of the federal government becomes relevant at this juncture too since the exclusion under Section 82030(b)(2) applies only to salary received by employees, not independent contractors. (*Rainey* Advice Letter, No. A-98-101; *Riddle* Advice Letter, No. A-97-294, and *Soldani* Advice Letter, No. A-94-042.)

⁹ See footnote 3, *supra*.

exception of Section 82030(b)(2) applies to your payments and you need not disclose them on your statement of economic interests.

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 that reads "Lisa L. Ditora" followed by a horizontal line.

By: Lisa L. Ditora
Staff Counsel, Legal Division

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