



FAIR POLITICAL PRACTICES COMMISSION

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March 10, 2000

Jimmy L. Gutierrez
12616 Central Avenue
El Central Real Plaza
Chino, California 91710

**Re: Your Request for Advice
Our File No. A-00-015**

Dear Mr. Gutierrez:

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

QUESTION

Would councilmember Contreras have a conflict of interest in a decision to provide a defense, pursuant to Government Code Section 36812.5, to an election contest challenging her election to the city council?

CONCLUSION

The typical election contest is fundamentally a claim against the conduct of an election by the government, rather than a claim of wrongdoing leveled against the successful candidate. That appears to be the case here, where no specific wrongdoing by Ms. Contreras is alleged in the affidavit supporting the contest. A defense to this election contest is only incidentally a defense of Ms. Contreras, who has an economic interest in the defense insofar as she receives a salary and benefits as an elected official. But her government salary and related benefits are not interests that can give rise to a conflict of interest under the Act. Absent some other, undisclosed economic interest, she may take part in decisions to fund a defense to the election contest.

¹ Government Code sections 81000 - 91015. Commission regulations appear at title 2, sections 18109 - 18996, of the California Code of Regulations.

FACTS

Rosanna Contreras was elected to the city council of the City of Coachella in the November 2, 1999, general election. The results of the election were certified and declared by the city council on December 1, 1999. She was elected by a margin of one vote.

On December 28, 1999, an elector's affidavit in support of election contest was filed pursuant to California Elections Code Sections 16100(d) and (e), and 16400, by contestant Juan DeLara. The affidavit alleges as follows:

“That in each of the nine voting precincts in the City of Coachella, including precinct 46001, 46002, 46006, 46007, 46010, 46011, 46012, 46013 and 46021 illegal votes were cast in favor of Rosanna Contreras, pursuant to California Elections Code § 16100(d), and that the Precinct Board, in conducting the election or in canvassing the returns, made errors sufficient to change the result of the election as to any person who has been declared elected, pursuant to Elections Code § 16100(e).”

Members of the city council receive a salary as established by Government Code Section 36516 for cities having a population up to and including 35,000. Councilmembers also have health, optical and dental insurance coverage.

ANALYSIS

The Act's conflict of interest rules prohibit public officials from making, participating in making, or in any way attempting to use their official positions to influence governmental decisions in which they have financial interests. (Section 87100; Regulation 18700(b) describes in detail each step of the analysis that follows.) The Act's conflict of interest rules apply only to public officials. As a member of the city council, Ms. Contreras is a public official governed by these provisions. (Section 82048.)

The prohibition of Section 87100 applies to specific conduct by public officials—making, participating in making, or using one's official position to influence a governmental decision. (Regulations 18702.1-18702.4.) Your letter presupposes that, if not prohibited, Ms. Contreras would make, or participate in making, governmental decisions on providing a publicly funded legal defense to the election contest.

If Ms. Contreras is going to take part in this decisionmaking process, she must determine whether she has a financial interest in the decision. 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 its effect on the public generally, on (among other enumerated economic

interests) the official's personal finances — that is to say, on the official's personal expenses, income, assets, or liabilities. (Section 87103; Regulation 18700(a); Regulation 18703.5.)

To answer your question, we will consider the possibility that a decision to provide a publicly funded legal defense to the election contest would have a foreseeable, material financial effect on Ms. Contreras' personal finances.² Her position as a paid elected official is jeopardized by the contest, and her salary is \$250 or more per any 12 month period. You have disclosed no other kind of economic interest in this decision, and we therefore consider only Ms. Contreras' interest in her personal finances. As a salaried public official, the effect of this decision on her personal finances would be readily distinguishable from its effects on the public generally. Thus, it would appear that Ms. Contreras would have a conflict of interest in a decision on a defense to the election contest—unless some other exception applies.

There is an exception which is applicable in this case. Section 82030(b)(2) provides that "income" does *not* include "salary and reimbursement for expenses or per diem received from a state, local or federal government agency." (See also Regulation 18705(c)(1).) In one of its first formal Opinions, the Commission determined that this "government salary exception" to the definition of income included pension benefits paid by a governmental entity. (In re *Moore*, (1977) 3 FPPC Ops. 33.) Since the *Moore* Opinion, we have applied the government salary exception to many other forms of employment-related benefits paid by governmental entities. (See, e.g. *Cosgrove* Advice Letter, No. A-98-145; *Flandrick* Advice Letter No. I-93-161, and references cited therein.)

By operation of the "government salary exception," the salary and employment-related benefits Ms. Contreras receives through her position on the city council are not "income" within the meaning of the Act. A decision to fund a defense to the election contest, even though it could potentially affect her government salary and benefits, does not therefore affect her "income" within the meaning of Section 87103 or Regulation 18703.5.

² An effect on an official's personal finances is "material" if it amounts to \$250 or more in any 12 month period. (Regulation 18705.5.) An official also has an economic interest in a source of income which has provided him or her \$250 or more over the preceding 12 months. (Section 87103(c); Regulation 18703.3.) Since the city pays Ms. Contreras a salary, it would appear at first glance that she has a second economic interest in a decision that might have a financial effect on the city, her source of income. However, "income" is defined at Section 82030, which excludes at subdivision (b)(2) "salary and reimbursement for expenses or per diem received from a state, local, or federal government agency." Thus a governmental employer is not regarded as a "source of income" by reason of the "government salary exception," discussed in the text *infra*.

Nor can such a decision have any other "personal financial effect." If the immediate impact of a decision on a public official's "government salary" is excluded from conflicts analysis by operation of the "government salary exception," derivative effects may not be admitted to change that outcome. We understand that the loss of an official position may well cause a large change in an official's economic well-being, which may *in turn* affect the official's assets, expenses, or liabilities. But these effects, when they are secondary to an effect on "government salary," are *not* potentially disqualifying "personal financial effects."

We have not always been consistent in describing an official's obligations in this area. The *Owen* Advice Letter, No. A-99-108, concluded that elected public officials would not have a conflict of interest in a decision to appeal an adverse judgment on a recall petition. But that conclusion was predicated on peculiar facts. The officials received no compensation or benefits of any sort from the city, and they had stated that they would not use their personal funds to defend the recall petition. Thus these officials could anticipate no financial gain or loss attributable to the decision. The *Owen* Advice Letter indicates that, if the officials had been paid a salary by the city, the recall would foreseeably have dispatched the officials to private sector jobs with higher or lower salaries, differing in an amount sufficient to disqualify the officials under the "personal financial effects" rule.

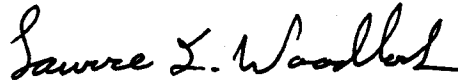
The *Owen* Advice Letter applied the "personal financial effects" rule in a fashion that effectively swallowed up the "government salary exception," and was superseded by the Commission at its public meeting on March 3, 2000. Specifically, the letter is superseded insofar as it states that effects on an official's personal finances are potentially disqualifying even if the "effects" are increases or decreases to an official's government salary. More generally, the *Owen* Advice Letter is superseded to the extent that it sanctions application of the "personal financial effects" rule in a fashion that undermines the "government salary exception" to the Act's definition of income.

Apart from potential effects on her salary and benefits, you have not disclosed any economic interest of Ms. Contreras that might possibly be affected by a decision on funding a defense to the election contest. The salary and benefits that Ms. Contreras receives from the city (all of which are "government salary" under *In re Moore*) mark her out as different from the unpaid officials treated in the *Owen* Advice Letter, but do *not* require her disqualification from any decision with foreseeable effects on her "government salary." Government salary is not "income" (Section 82030(b)(2)), and the "personal financial effects" rule will not be applied to undo the intended effect of the "government salary exception."

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

Sincerely,

Luisa Menchaca
Assistant General Counsel



By: Lawrence T. Woodlock
Staff Counsel, Legal Division

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