



FAIR POLITICAL PRACTICES COMMISSION

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March 26, 2002

Shirley J. Hoch
South San Francisco
Unified School District
398 B Street
South San Francisco, CA 94080-4423

Re: Your Request for Advice
Our File No. A-02-060

Dear Ms. Hoch:

This letter is in response to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ The Commission does not act as a finder of fact when it renders advice. This advice is based upon the facts as provided in your request letter. This advice is applicable and confers immunity only to the extent that the facts provided to us are correct, and that all of the material facts have been disclosed. (*In re Oglesby* (1975) 1 FPPC Ops. 71; Govt. Code § 83114.) Please note that this letter should not be construed to evaluate any conduct that has already taken place. (Regulation 18329(b)(8)(A), copy enclosed.)

QUESTIONS

1. Should you accept a salary for your currently unpaid position as executive director of the South San Francisco Foundation for Youth, may you, as a member of the South San Francisco United School District Board of Trustees, participate in decisions of the Board concerning proposed gifts to the District from the Foundation?
2. Has the Commission superseded its advice granted to you on March 17, 1993, in Advice Letter No. A-93-082, concerning conflict-of-interest and other provisions of the Act?

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations. As used herein, "section" refers to a section of the Act and "regulation" refers to a section or subdivision of the Commission's regulations.

3. Does the Act prohibit the Foundation from leasing District facilities for the purpose of conducting fundraising activities therein?

CONCLUSION

1. Should you accept a salary from the South San Francisco Foundation for Youth, you will have a disqualifying conflict of interest and may not participate in decisions of the Board regarding acceptance of gifts to the South San Francisco Unified School District by the Foundation. In addition, in light of the present arrangements to make your position of executive director a paid position, you may presently have a disqualifying conflict of interest prohibiting you from participating in such decisions.
2. Our advice letter to you (A-93-082) has not been superseded. The conflict-of-interest analysis and discussion of controlled committees contained in that advice letter remain valid.
3. Since presumably the Foundation is not a public agency, a decision of its officers and directors to lease space in District facilities is not subject to the conflict-of-interest provisions of the Act.

FACTS

You are currently an elected member of the Board of Trustees ("Board") of the South San Francisco Unified School District ("District"). You state that you also currently occupy the position of executive director of the South San Francisco Foundation for Youth ("Foundation"), a non-profit foundation under section 501(c)(3) of the Internal Revenue Code. You state that this position will shortly become a paid position, provided that acceptance of a salary will not cause you to incur a conflict of interest with respect to the decisions you will make as a member of the Board of Trustees of the South San Francisco Unified School District. Among your duties as executive director of the Foundation, you assist in fundraising and also assist teachers in writing grant requests, both of which are endeavors previously benefiting the District.

The Foundation raises money to benefit the educational and recreational activities of the youth in South San Francisco, and assists other non-profit organizations to raise funds and support projects in the South San Francisco community. The majority of funds raised are donated to District for purposes such as its music program, library funds, PTA projects, sports programs, "safe and sane" graduation activities, and student exchange programs.

You further state that in October 2001, a bingo permit was transferred from the Boys and Girls Club of North San Mateo County to the Foundation. The Foundation is currently seeking approval to rent a school multipurpose room for 10 hours per week in order to conduct bingo fundraising activities therein. The Board, you indicate, does not

make a decision on requests of this nature. Rather, the decision is made by District employees, using existing Board-approved policies and criteria which are applied uniformly to all applicants. A police permit necessary for the bingo activity is currently being held in abeyance, you state, due to police concerns regarding a possible conflict of interest attributable to your positions on the Board and Foundation.

ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. The Commission has adopted an eight-step standard analysis for deciding whether an official has a disqualifying conflict of interest (Regulation 18700, subdivisions (b)(1) – (8)), which is discussed below. The general rule, however, is that a conflict of interest may occur whenever a public official makes a governmental decision which may materially affect one or more of his or her financial interests.

1. & 2. Are you a public official making, participating in making, or influencing a governmental decision?

The conflict-of-interest prohibition applies only to public officials. A public official is defined as a “member, officer, employee or consultant of a state or local government agency....” (Section 82048; regulation 18701(a).) As an elected member of the South San Francisco Unified School District Board of Trustees, you are a public official.

The conflict-of-interest provisions of the Act apply to those actions of a public official which constitute making, participating in making, or influencing a governmental decision. (Section 87100.) Not all actions of a public official fall under that characterization. Regulation 18702.4 identifies a number of actions, including those which are solely ministerial, that are exceptions. A ministerial action is one in which a public official exercises no discretion (*Hart Advice Letter, I-91-037*) whereas an action which commits an agency to a course of conduct, enters into a contract on behalf of the agency, or votes on an agency matter, falls within that characterization (regulation 18702.1(a). Since a vote to accept or reject a gift is an exercise of a public official’s discretion, it is more than a mere ministerial act, even if the vote is directed at a “consent agenda item” in which matters are voted on in mass.

You also question whether the Foundation is conflicted from renting a school facility or whether you, in your capacity as its executive director, may conduct fundraising under the auspices of the Foundation. Under the facts provided, the Foundation does not constitute a public agency.² Consequently, the Foundation’s officers

² In *In re Siegel* (1977) 3 FPPC Ops. 62, we articulated four criteria we deem helpful when determining whether we will deem a private, nonprofit entity to be a local government agency, for purposes of the Act. In essence, these are circumstances in which a nonprofit entity functions as an alter ego for a governmental agency. It is not necessary that all four criteria be found present in a given set of

and directors are not public officials, when acting in their capacity as Foundation employees. Decisions made by those individuals on behalf of the Foundation (including decisions relating to fundraising or leasing District classroom space) are not governmental decisions subject to the conflict-of-interest provisions of the Act.

On the other hand, should the Board become involved in making, participating or making, or influencing the District decision whether to lease classroom space to the Foundation, such participation in the decision making process would be subject to the conflict-of-interest provisions of the Act. You state, however, that the decision of the District whether to lease classroom space to the Foundation is made by District employees other than the Board, utilizing existing policies and criteria which have heretofore been approved by the Board and apply to requests of any entity seeking to utilize District facilities.³

Be aware, however, that state and local agencies are authorized to adopt "statements of incompatible activities" that govern their employees' conduct. State and local agencies can prohibit their employees from engaging in any outside employment, activities, or enterprises which are inconsistent or in conflict with their duties as agency employees, or which are subject to control or approval by their state or local agency employer. (Government Code sections 19990 and 1126, et seq.) This area of law is outside the jurisdiction of the Commission and we offer no advice thereon. You should check with your agency counsel regarding these laws.

3. What are your economic interests?

The Act's conflict-of-interest provisions apply only to conflicts of interest arising from economic interests. The economic interests which might give rise to a conflict of interest are defined in regulations 18703-18703.5. Under the facts provided, the specific economic interest potentially applicable to you is your interest in the Foundation as a source of income to you.

A public official has an economic interest in any person, including an entity designated as a nonprofit entity under section 501(c)(3) of the Internal Revenue Code, from whom he or she has received income which aggregates to \$500 or more within 12 months prior to the governmental decision. (Section 87103(c); regulation 18703.3.) You indicate that you have not received income as of yet from the Foundation. At such time as you receive income of \$500 or more from the Foundation, it will become an economic interest to you.⁴

circumstances in order for a nonprofit entity to be deemed a local government agency. *Knox* Advice Letter, A-90-038. If you believe that the holding of *Siegel* applies to the Foundation, you may wish to write us for further advice.

³ We do not offer advice in response to the question you raise regarding a possible conflict of interest involving a fellow officer of the Foundation who is also a member of the Board. The Commission does not offer advice in response to unauthorized request on behalf of third parties. (Regulation 18329(b)(8)(B)).

⁴ You should be aware that Section 82030(b)(2) of the Act provides that "income," for the purposes of the Act, does not include "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."

Nevertheless, a public official may have a present economic interest in a person, including a nonprofit entity, when future income of \$500 or more is promised from that person.⁵ Income is "promised" within the meaning of our regulations when the public official has a present, legally enforceable right to receive the promised income. (Regulation 18703.3(a).) It is not clear from the facts you provide whether your potential income from the Foundation represents a legally enforceable promise to pay by the Foundation, or is merely based on preliminary discussions. If so, the Foundation is a source of income to you and you may presently have a disqualifying conflict of interest prohibiting you from participating in decisions of the Board on whether to accept gifts proffered to the District by the Foundation.

A public official will also have an economic interest in sources of gifts "aggregating three hundred twenty (\$320) 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." (Regulation 18703.4.) You indicate that the principal purpose of the Foundation is to raise funds which are subsequently donated to the District or other programs benefiting the youth of South San Francisco. It is likely, therefore, that in your private capacity as an officer of the Foundation you may be called upon to conduct, or otherwise participate in, fundraising activities on its behalf.

Should you engage in fundraising for the Foundation, a person may donate money to the Foundation at your behest, or you might find yourself receiving donations on behalf of the Foundation, which you forward into the Foundation accounts. The general rule in these circumstances is that, for purpose of the conflict-of-interest provisions of the Act, these funds will not be treated as a gift to you (*Casey Advice Letter*, No. A-93-082; *Bremberg Advice Letter*, No. A-89-445). Consequently, a source of donations to the Foundation will generally not be considered a potential disqualifying economic interest to you.

4. Are your economic interests directly or indirectly involved in the decision?

A person who is a source of income is directly involved in a decision before a public official's agency when that person initiates the proceeding or is a named party, or is the subject of, the proceeding in which the governmental decision will be made. (Regulation 18704.1(a).) The Foundation is directly involved in the decision before the Board. Therefore, if the Foundation comprises an economic interest to you, then that economic interest will be directly involved in the decision.

5.&6. Will there be a reasonably foreseeable material financial effect on one or more of your economic interests?

Not all governmental decisions by a public official which impact his or her economic interests give rise to a conflict of interest. It is when the reasonably foreseeable

⁵ For the purpose of our analysis, we assume that your future salary will aggregate \$500 or more over a 12-month period.

impact on his or her economic interests is material (or important) that a conflict may arise. The determination of foreseeability and materiality is necessarily a factual question. In this regard, we are not finders of fact and our analysis is dependent upon the facts which you supply.

Any reasonably foreseeable financial effect upon a person which is a source of income to a public official, and which is directly involved in a decision before the official's agency, is deemed material. (The so-called, "one-penny" rule). (Regulation 18705.3(a).) Under regulation 18706, an effect upon economic interests is considered reasonably foreseeable if there is a substantial likelihood that it will occur. A financial effect need not be certain to be considered reasonably foreseeable, but it must be more than a mere possibility. (*In re Thorner* (1975) 1 FPPC Ops. 198.)

In this instance, it is more than a mere possibility that if the District will accept gifts from the Foundation there will be material financial effect upon the Foundation from that decision. It is axiomatic that a gift from the Foundation's financial assets will shrink those assets by the amount of the gift. Thus, absent an exception, should you receive \$500 or more in salary from the Foundation, or have a present legally enforceable right to receive such salary, you have a disqualifying conflict of interest prohibiting your participation in these decisions of the Board.

7.& 8. Will the governmental decision have an economic impact upon you indistinguishable from the impact upon the public generally? Are you legally required to participate in the decision?

A conflict of interest does not in all instances disqualify a public official from making, participating in making, or influencing a governmental decision. There are two narrow exceptions (regulations 18707 "public generally" and 18708 "legally required participation") which may apply.

In brief, under the public generally exception, a public official may participate in a governmental decision which may reasonably be foreseen as having a material financial impact upon his or her economic interest when the decision "affects the public official's economic interests in a manner which is indistinguishable from the manner in which the decision will affect the public generally." (Regulation 18707(a).) As explained in regulation 18707.1, the decision need not affect all members of the general public, but only a significant segment of the general public:

"The governmental decision will affect a 'significant segment' of the public generally if any of the following are affected as set forth below:

* * * *

(C) Business Entities. For decisions that affect a business entity in which a public official has an economic interest, the decision also affects 2,000 or twenty-five percent of all business entities in the jurisdiction or the district the official represents, so long as the effect is on persons composed of more than a single industry, trade, or profession. *For purposes of this subdivision, a not for profit entity other than a governmental entity is treated as a business entity* (emphasis added).

The decision to accept a gift offered by the Foundation is a decision uniquely affecting the Foundation. No other entity's financial interests are bound up in the Foundation's pledge of that gift. The Foundation's assets alone are the assets which will be gifted to the District. Once those assets have transferred to the District, the decision is consummated. The public generally exception does not apply in the circumstances you describe.⁶

Campaign Disclosure Obligations and Foundation Fundraising

You presented a number of facts and posed a question regarding your current and future efforts as the Foundation's executive director to engage in fundraising on its behalf. This raises another area of which you should be made aware. Since you are an elected public official, you are a "candidate" within the meaning of the Act⁷ and subject to campaign disclosure obligations imposed by the Act. Under certain circumstances, an organization upon which you exert a degree of control, which also receives contributions (fundraising) and makes expenditures, might be considered your "controlled committee." (Regulation 18217(f), copy enclosed.) Under the Act, there are reporting obligations with respect to financial activities undertaken by a candidate's controlled committee. It is possible, therefore, that the Foundation's financial activities may have to be reported as the activities of your controlled committee. We discussed this extensively in our prior advice to you (A-93-082). The facts you provide in your letter are insufficient to allow us to make any determination in this regard at the present time.

You should review our regulations and our prior letter to determine whether the Foundation might be characterized as your controlled committee. If, after your review, you have questions concerning this, you may request our advice. Any such request should contain sufficient facts to allow us to evaluate your specific situation.

You may find our enclosed publication, "Can I Vote?" together with our eight-step analysis above, helpful in answering any future questions you might have regarding the obligations of public officials under the Act's conflict-of-interest rules. You may also wish to consult with your city attorney or the Attorney General's office regarding common law conflict of interest and/or Government Code Section 1090⁸ to further

⁶ You ask whether the written advice you previously received from us in our March 17, 1993 advice letter (A-93-082) has been superseded. This advice letter has not been formally superseded. Although the references to our regulations contained therein generally are no longer accurate due to subsequent amendment and re-numbering of our regulations, the analysis and conclusions drawn therefrom remain valid. Our discussion of controlled committees, in particular, is unaffected by the passage of time.

⁷ A candidate for public office remains a "candidate," for purposes of the Act, until such time as his or her activities are no longer of the type requiring disclosure under the campaign reporting requirements of the Act (section 82007; section 84214 and regulation 18404). Thus, an elected officeholder may still be considered a "candidate" for campaign disclosure purposes, until the termination requirements of section 84214 and regulation 18404 are met.

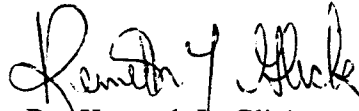
⁸ The conflict-of-interest provisions of the Act and of Government Code Section 1090, et seq. are two distinct statutory schemes, each imposing its own compliance obligations. Moreover, an agency is empowered under Government Code sections 1126, et seq., and section 19990 (discussed briefly above) to

clarify your eligibility to participate in the governmental decisions of the Board. The Commission's jurisdiction to administer and enforce conflict-of-interest matters is limited to that conferred under the Act, as amended.

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

Sincerely,

Luisa Menchaca
General Counsel



By: Kenneth L. Glick
Counsel, Legal Division

Enclosures
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adopt statements of incompatible activities which impose further distinct obligations upon an agency's employees.