



## FAIR POLITICAL PRACTICES COMMISSION

428 J Street • Suite 620 • Sacramento, CA 95814-2329

(916) 322-5660 • Fax (916) 322-0886

August 1, 2003

Joseph Mellett  
County of Humboldt  
825 Fifth Street  
Eureka, CA 95501

**Re: Your Request for Informal Assistance  
Our File No. I-03-146**

Dear Mr. Mellett:

This letter is in response to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").<sup>1</sup> This letter is limited solely to the provisions of the Act and should not be taken as advice or an opinion regarding any other area of the law potentially raised by your letter. In addition, we are providing only informal assistance because there is no pending decision before the planning commission.<sup>2</sup>

### QUESTION

May Mr. Mellett run for a vacant seat on the Palmer Creek Community Services District Board while remaining an employee for the Humboldt County Auditor-Controller?

### CONCLUSION

Holding a position as an employee for the Humboldt County Auditor-Controller while simultaneously working as a board member of the Palmer Creek Community Services District does not in itself create a conflict of interest under the Political Reform

<sup>1</sup> Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations. All statutory references are to the Government Code unless otherwise indicated.

<sup>2</sup> Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Government Code section 83114; 2 Cal. Code of Regs. section 18329(c)(3), copy enclosed.)

Act. Due to the governmental salary exception, generally a public official does not have a conflict of interest in a decision involving his or her employer, if the employer is a governmental agency. In this case, Mr. Mellett's income does not result in a conflict of interest in decisions pertaining to either Humboldt County or the District Board, unless he is personally affected by a decision. It would be advisable to contact the Attorney General's office concerning the doctrine of "incompatible offices" and other provisions of law that might apply to your facts. Our advice is limited to the Act.

### FACTS

You are a California CPA employed by the Humboldt County Auditor-Controller. In the scope of your employment, you render certain services to local governmental special districts. These services include processing claims for disbursement of district funds in the county treasury and providing districts with financial reports of the activity in those funds. You make no managerial decisions for those districts. Generally, the districts have independent boards that make those decisions and they utilize your office strictly as a provider of accounting services.

You live in the jurisdiction of the Palmer Creek Community Services District near Fortuna. This district provides water and sewer service for its residents. The district's board has a couple of vacancies coming up and you were thinking about applying to serve on that board. Board members are compensated by the district waiving their monthly sewer fee of \$25 for each monthly meeting the member attends.

You understand that from the viewpoint of solid accounting controls you would not wish to be a board member that signs claims for disbursements of district funds. That would put you in the position of being able to initiate transactions, process them and control the reporting after the fact. Eliminating your ability to initiate disbursements would mitigate some control concerns the district's auditors might have.

### ANALYSIS

The purpose of the conflict-of-interest provisions in the Act is to ensure that public officials use their authority in an impartial, unbiased manner. (Section 81001(b).) Section 87100 of the Act prohibits a public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which they know or have reason to know they have a disqualifying conflict of interest. Under section 87103, a public official has a financial interest in a decision within the meaning of section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, or on a member of his or her immediate family. The Commission has adopted a standard eight-step analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision. (Regulation 18700, subdivisions (b)(1)-(8).)

**Step 1- Public Official?**

The first step in the analysis is to determine whether Mr. Mellett is a public official. The Act's disqualifying conflict-of-interest provisions apply only to "public officials." (Sections 87100, 87103; regulation 18700, subd. (b)(1).) As both an employee of the Humboldt County Auditor-Controller and as a possible member of the District Board, Mr. Mellett qualifies as a public official and is subject to the conflict-of-interest provisions of the Act. (Section 82048.)

**Step 2- Making, Participating in Making or Influencing a Governmental Decision?**

The second step is to determine if the public official will be making, participating in making or influencing a governmental decision. A public official "makes a governmental decision" when the official, acting within the authority of his or her office or position, votes on a matter, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (Section 87100; regulation 18702.1.) A public official "participates in making a governmental decision" when, acting within the authority of his or her position and without significant substantive or intervening review, the official negotiates, advises or makes recommendations to the decision maker regarding the governmental decision. (Section 87100; regulation 18702.2.) A public official is attempting to use his or her official position to influence a decision before his or her own agency if, for the purpose of influencing, the official contacts or appears before any member, officer, employee, or consultant of his or her agency. (Section 87100; regulation 18702.3.)

As a board member with the District, Mr. Mellett will not be "making a governmental decision" or "participating in making" or otherwise "influencing" a decision affecting his concurrent position as an employee of the Humboldt County Controller since the District is a subset of the County. However, because Mr. Mellett is an employee on the county level, he could be making or participating in a governmental decision on the County level that affects the District.

**Step 3- What are the applicable economic interests?**

This step analyzes whether an economic interest of a public official is affected by the decision. Section 87103 provides that a public official has a disqualifying "financial interest" in a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on the official's economic interests, described below:

- A public official has an economic interest in his or her personal finances, including those of his or her immediate family-- (this is the "personal financial effects" rule. (Section 87103; regulation 18703.5.)

- A public official has an economic interest in any person from whom he/she has received income aggregating five hundred dollars (\$500) within 12 months prior to the time when the relevant governmental decision is made. (Section 87103(c); regulation 18703.3.)

Both the District and the Humboldt County Auditor-Controller are governmental agencies, and the salary from either agency would operate as a source of income to you, absent an exception. (Section 82041.) Salary and reimbursement for expenses and per diem from a state, local or federal governmental agency is expressly exempted from the definition of "income" for purposes of the Act. (Section 82030(b)(2).) This would apply to your salary from the county.

In addition, the waiver of the sewer fee for any month a board member attends a board meeting satisfies the standard set forth in regulation 18232(a): "[s]alary' from a state, local, or federal government agency means any and all payments made by a government agency to a public official, or accrued to the benefit of a public official, as consideration for the public official's services to the government agency." As indicated by the facts, Mr. Mellett receives a waiver of \$25 for each monthly meeting he attends. Such funds operate as a payment made by a governmental agency to a public official as consideration for that public official's services to the governmental agency. Thus, the salary Mr. Mellett receives is not disqualifying "income" for purposes of section 87103(c), because it qualifies under the "salary" exception under regulation 18232(a).

While a decision affecting an official's governmental salary will not generally be a problem, a decision affecting personal finances may still result in disqualification. Thus, we continue the analysis below.

#### **Step 4- Direct or Indirect Involvement.**

Regulation 18704.5 provides that a public official or his or her immediate family are deemed to be directly involved in a governmental decision which has any financial effect on his or her personal finances or those of his or her immediate family.

#### **Steps 5 and 6: Materiality and Foreseeability.**

Knowing the degree to which the economic interest is involved in the city council's decision, the next step is picking the appropriate standard for evaluating the materiality, that is, the importance of the effect of the decision on the economic interest. (Regulation 18700(b)(5).) The sixth, and usually most important step, in deciding whether you have a conflict of interest is using the materiality standards (from step 5) to decide if a *material* financial effect on one or more of your economic interests is reasonably foreseeable as a result of the decision. (Regulation 18706.) As used here, "reasonably foreseeable" means "substantially likely." (Regulation 18706; *In re Thorner* (1975) 1 FPPC Ops. 198.) A financial effect need not be a certainty to be considered

reasonably foreseeable; a substantial likelihood that it will occur suffices to meet the standard. On the other hand, if an effect is only a mere possibility, it is not reasonably foreseeable. (*Ibid.*)

For purposes of analyzing personal financial effects, we have stated that the personal effect test will not serve to require an official to disqualify himself or herself, if the decision affects only the salary, per diem, or reimbursement for expenses the official receives from a local governmental agency. (Regulation 18705.5(b).) Therefore, a decision affecting an official's governmental salary will not generally be a problem under this rule, "unless the decision is to hire, fire, promote, demote, suspend without pay or otherwise take disciplinary action with financial sanction against the official or a member of his or her family, or to set a salary for the official or a member of his or her immediate family which is different from salaries paid to other employees of the government agency in the same job classification or position." (Regulation 18705.5(b).)

However, this standard must be applied on a decision-by-decision basis.

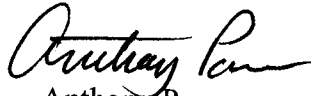
**Steps 7 and 8: Public Generally and Legally Required Participation Exceptions.**

Step seven is an exception that applies where the reasonably foreseeable and material financial effect on the official's economic interest is not distinguishable from the effect on the public generally, and step eight is an exception that applies when the official is legally required to participate in the decision. Since your question does not pertain to a specific decision, we cannot advise on these exceptions.

As discussed earlier, our advice is limited to the Act. You may wish to contact the Attorney General's office concerning other provisions of law, such as the law governing incompatible public offices and Government Code section 1090. If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca  
General Counsel

By:   
Anthony Pane  
Intern, Legal Division

AP:jg

Enclosure: Reg. 18329

I:\AdviceLtrs\I-03-146