



FAIR POLITICAL PRACTICES COMMISSION

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March 13, 2008

Henry T. Perea
Councilmember, Council District Seven
Fresno City Council
2600 Fresno Street, Room 2097
Fresno, CA 93721-3600

RE: Your Request for Advice
Our File No. A-08-014

Dear Mr. Perea:

This letter responds to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act") and is based on the facts presented; the Fair Political Practices Commission (the "Commission") does not act as a finder of fact when it renders advice.¹ (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Additionally, we base our advice solely on the provisions of the Act and do not address the applicability, if any, of other conflict-of-interest laws such as common law conflict of interest or Government Code Section 1090. We urge you to contact your agency counsel regarding the application of these other conflict-of-interest laws, particularly Section 1090.

QUESTION

May you, as a Councilmember, participate in negotiations and decisions relating to the appropriation of public funding and the purchase of the Neighborhood Center/Gymnasium from the Fresno County Economic Opportunities Commission (FCEOC), a non-profit private corporation, which currently employs your wife?

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

CONCLUSIONS

It appears that the FCEOC is a local government agency, such that your wife's salary paid by the agency is not income for purposes of conflict of interest disqualification. However, you may still have to disqualify yourself if there is a personal financial effect on you or your wife.

FACTS

You are an elected member of the Fresno City Council. Your wife is employed by the Fresno County Economic Opportunities Commission (FCEOC), a non-profit 501(c)3 private corporation. Her income from the FCEOC has exceeded \$1,000 in the prior 12 months. The FCEOC was formed pursuant to the Economic Opportunities Act of 1964. One third of the board members are public elected officials, while another one third come from various public agencies and community groups; the final third are elected low-income target area representatives. The FCEOC acts pursuant to the Economic Opportunity Act. It provides services to the community, including vocational training, counseling, and education, counseling and treatment for juvenile offenders, and health and nutrition education, among others. It is also subject to the Brown Act.

The Fresno City Council is considering an appropriations resolution for \$2 million in Park Impact Fees for the purchase and use of a youth center and gymnasium. The purchase will be from the FCEOC.

As a member of the Fresno City Council, you will be asked to participate in the decision-making process regarding the appropriation and purchase.

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. A public official has a "financial interest" in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the governmental decision will have a material financial effect on one or more of the public official's economic interests. (Section 87103; Regulation 18700(a).) The Commission has adopted an eight-step standard analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision, which we apply to your question. (Regulation 18700(b)(1)-(8).)

Step One: Are you a public official for purposes of the Act?

Under the Act, a public official is "every member, officer, employee or consultant of a state or local government agency." (Section 82048.) As a member of the Fresno City Council, you are a public official.

Step Two: Are you making, participating in, or influencing a governmental decision?

Because you will be called upon to consider governmental decisions relating to the appropriation of public funds and the purchase of the neighborhood center and gymnasium, you will be making, participating in making, or otherwise using your official position to influence a governmental decision. (Section 87100; Regulations 18702-18702.4.)

Step Three: What are your economic interests?

The Act's conflict-of-interest provisions apply only to conflicts of interest arising from certain enumerated economic interests. These economic interests are described in Section 87103 and Regulations 18703-18703.5, inclusive:

- A public official has an economic interest in a business entity in which he or she has a direct or indirect investment of \$2,000 or more. (Section 87103(a); Regulation 18703.1(a).)
- A public official has an economic interest in a business entity in which he or she is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d); Regulation 18703.1(b).)
- A public official has an economic interest in real property in which he or she has a direct or indirect interest of \$2,000 or more. (Section 87103(b); Regulation 18703.2.)
- An official has an economic interest in any source of income, including promised income, totaling \$500 or more within 12 months prior to the decision. (Section 87103(c); Regulation 18703.3.)
- A public official has an economic interest in any source of gifts to him or her if the gifts total \$390 or more within 12 months prior to the decision. (Section 87103(e); Regulation 18703.4.)
- A public official has an economic interest in his or her personal expenses, income, assets, or liabilities, as well as those of his or her immediate family. This is commonly referred to as the "personal financial effects" rule. (Section 87103; Regulation 18703.5.)

There is one potential economic interest.

Source of Income: Under the Act, a source of income is defined as “a payment received, including but not limited to any salary, wage, [...] and including any community property interest in the income of a spouse.” (Section 82030(a)). Thus your wife’s salary creates an economic interest for you in her employer if she has received \$1,000 or more from the employer.²

However, the Act also exempts from sources of income the following:

Salary and reimbursement for expenses or per diem, and social security, disability, **or other similar benefit payments 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. (Section 82030(b).)

Therefore, in order to determine whether the wages earned from the FCEOC are considered a source of income, we must first determine whether the FCEOC is a local government agency for the purposes of the Act. A non-profit corporate entity can be a government agency for the purposes of the Act. The issue was decided in *In re Siegel*, where the Commission applied a four-part test.

Was the impetus for formation of the corporation originated with a government agency?

According to the organization’s general information and background, the FCEOC was formed as a Community Action Agency, created to further the goals of the Economic Opportunity Act of 1964. As with other similar organizations, one third of the board members are public elected officials, while another one third come from various public agencies and community groups. We have previously found this formation and structure to be sufficient to meet this factor in the *Siegel* test. (*Soldani* Advice Letter, No. A-94-042).

Was it is substantially funded by, or its primary source of funds is, a government agency?

The FCEOC has a budget of approximately \$114 million. It is funded by all levels of government, as well as donations, business, and user fees. The majority of their funding comes from the federal government; combined with local and state government funding, it appears that various government entities are the primary source of funds for the FCEOC.

² Because an official has a one-half community property interest in a spouse’s salary, the official has met the \$500 threshold once the spouse earns \$1000 or more.

Is one of the principal purposes for which it is formed to provide services or undertake obligations which public agencies are legally authorized to perform and which, in fact, they traditionally have performed?

The FCEOC acts pursuant to the Economic Opportunity Act. The services it provides include vocational training, counseling, and education, counseling and treatment for juvenile offenders, and health and nutrition education, among others.

Is the Corporation treated as a public entity by other statutory provisions?

You indicate that the FCEOC publicizes and holds its public meetings in accordance with the Brown Act. (Gov. Code, Sections 54950-54963.) Given this fact and that one third of the FCEOC's board members are public officials, we conclude that the FCEOC meets this factor of the *Siegel* test.

If the majority of the FCEOC's funding comes from government funds, then it is likely that the FCEOC is a local government agency pursuant to the test in *Siegel* for purposes of the Act. Because of this, the wages earned by your wife for her work with the FCEOC are probably not a source of income for the purposes of the Act.

Based on application of these four factors, it appears the FCEOC is a local government agency for purposes of the Act. Because of this, the wages earned by your wife for her work with the FCEOC are subject to the exception in Section 82030(b) and FCEOC is not a source of income for the purposes of the Act.

Personal Financial Effect: Finally, there is what is commonly referred to as a "personal financial effect." A public official has an economic interest in his or her personal expenses, income, assets, or liabilities, as well as those of his or her immediate family. (Section 87103; Regulation 18703.5).

Step Four: Is the economic interest directly or indirectly affected by the decisions?

Personal Financial Effect

If there is any financial effect on the personal finances of a public official, they are deemed to be directly involved in a decision. It is presumed that any public official has an interest in his or her personal finances. Therefore, if there is an interest, it is directly affected by the decision.

Step Five and Six: Will there be a material and foreseeable financial effect on the economic interest involved?

Regulation 18705.5(a) provides that a reasonably foreseeable financial effect on a public official's personal finances is material if it is at least \$250 in any 12-month period.

Moreover, Regulation 18705.5(b) provides:

“(b) The financial effects of a decision which affects only the salary, per diem, or reimbursement for expenses the public official or a member of his or her immediate family receives from a federal, state, or local government agency shall not be deemed material, 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 immediate 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.”

Based on the facts provided to us, it is not foreseeable that your personal finances will be materially affected. You have stated that your wife is a salaried employee, who receives no payment per project and only receives bonuses as part of a set annual review. Her salary, and therefore your financial interest, is unlikely to be affected by this governmental decision.³

Steps Seven and Eight: Are there any exceptions to the conflicts of interest rules?

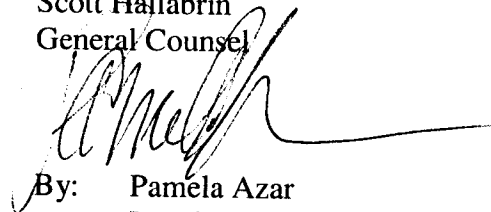
An official who otherwise has a conflict of interest in a decision may still participate under the "public generally" exception. This exception applies when the financial effect of a decision on a public official's economic interests is substantially the same as the effect on a significant segment of the public. The "legally required participation" rule applies when the official's participation in a governmental decision is legally required. (Section 87101; Regulation 18708.) You have not presented any facts indicating that these exceptions are applicable to your situation; therefore we do not address them here.

³ When a public official who holds an office specified in section 87200 has a conflict of interest in a decision noticed at a public meeting, then he or she must: (1) immediately prior to the discussion of the item, orally identify each type of economic interest involved in the decision as well as details of the economic interest, as discussed in regulation 18702.5(b), on the record of the meeting; (2) recuse himself or herself; and (3) leave the room for the duration of the discussion and/or vote on the item. For closed sessions, consent calendars, absences and speaking as a member of the public regarding personal interests, special rules found in regulation 18702.5(c) and 18702.5(d) apply.

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

Sincerely,

Scott Hallabrin
General Counsel

A handwritten signature in black ink, appearing to read 'P. Azar', with a long horizontal flourish extending to the right.

By: Pamela Azar
Legal Intern
Legal Division

PA:jgl