



FAIR POLITICAL PRACTICES COMMISSION

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

(916) 322-5660 • Fax (916) 322-0886

July 16, 2008

Mr. John A. Shupe
Shupe and Finkelstein
177 Bovet Road, Suite 600
San Mateo, California 94402-3191

Re: Your Request for Advice
Our File No. A-08-095

Dear Mr. Shupe:

This letter responds to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ You are acting General Counsel for the Foothill DeAnza Community College District. District Trustee Betsy Bechtel has authorized you to request advice from the Commission on the questions below.

This letter 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. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Additionally, Commission advice is limited to obligations arising under the Act. We 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.

QUESTIONS

1. Does Trustee Bechtel, who is a director of a local private bank, have a disqualifying conflict of interest under Government Code Section 87100 if she participates in a community college district governing board vote to ratify a district check payable to that bank?

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.

2. May Trustee Bechtel participate in routine votes to ratify district warrants including payments to the private bank for amounts owing to the bank by virtue of contracts previously entered into by the bank and the district?

CONCLUSIONS

1. Ms. Bechtel has a disqualifying conflict of interest under the Act. She may not participate in the Board's vote to ratify a community college district check payable to the private bank.

2. Ms. Bechtel has a disqualifying conflict of interest and may not participate in governing board votes to approve payments to the bank made pursuant to a previously agreed upon contract.

FACTS²

Ms. Bechtel is a member of the board of trustees for the Foothill DeAnza Community College District, the boundaries of which cover several communities in Santa Clara County. Trustee Bechtel is a retired employee of a private bank. She owns stock in that bank which she derived from that employment, which constitutes less than three percent of the stock of the bank. She receives dividends from that stock which constitute less than five percent of her total annual income. She also receives pension payments from the bank which constitute more than five percent of her total annual income. In addition, the Trustee holds a seat on the board of directors of the private bank, but is not on the bank's loan committee.

When the bank's proposed contract with the district came up for action by the governing board in 2006 Trustee Bechtel recused herself. From time to time, however, warrants are presented for ratification by the governing board, occasionally including warrants for payments to the bank for services rendered to the District under the same 2006 contract.

Your first question involves the governing board's vote to ratify a district check payable to the private bank described above. The district does not do its banking at this institution. However, one of the contractors which the district selected to perform construction work on district property chose the bank as the depository of the retainage sums withheld by the district from payment to the contractor. The district check which would be the subject of a Governing Board vote to ratify is payment of some or all of the retainage money owed by the district to the contractor. The bank will hold funds in an interest bearing account until the district and the contractor agree that the retainage should be released. At that point the bank will pay the money over to the contractor.

² The additional facts you provided on July 8, 2008 are incorporated into this letter.

Your second question is whether the Trustee's disqualification continues with respect to board actions to approve payments to the bank where the obligation to pay is based on the 2006 contract. Approximately every two months the governing board is presented with a consent agenda item to "approve all warrants." "Warrants" are district payments to employees for wages and salary and to vendors for services or goods sold. In most cases the payments have already been made, i.e., the checks have already been signed by the appropriate district administrator and mailed out to the vendor. "Ratification" in this sense is an after the fact approval required by Education Code Sections 81655 and 81656. The Trustee had a disqualifying conflict of interest with respect to the previous board vote on the 2006 contract with the bank. The Trustee removed herself from that matter in the fashion required by law. However, the Trustee questions the need to continue disqualifying herself from later consent agenda votes to ratify warrants to the bank, since the underlying contract has already been formed, is valid, and the payment which is to be ratified is legally owed.

ANALYSIS

The Act's conflict-of-interest provisions ensure that public officials will "perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them." (Section 81001(b).) 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 analysis for determining whether an official has a disqualifying conflict of interest. (Regulation 18700(b).)

Step 1. Is the Trustee a public official?

Section 82048 defines a public official as "every member, officer, employee or consultant of a state or local government agency." We have advised that a community college district is a local government agency. (*Washington Advice Letter*, No. A-02-034a.) As a member of the Foothill DeAnza Community College District, Ms. Bechtel is a public official subject to the Act's conflict-of-interest rules. (Section 82041.)

Step 2. Is the Trustee making 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. (Regulation 18702.1.) In voting to approve a district check payable to a private bank, Trustee Bechtel is making a governmental decision as defined in Regulation 18702.1. Despite the facts that the governing board of the community college district regularly votes to ratify district warrants on its consent agenda, and that the ratification is "after the fact" approval of checks already mailed by the district administrator, the approval of warrants is making a governmental decision

within the meaning of Regulation 18702.1. We have advised that the routine approval of warrants constitutes making a governmental decision in the *Wilder* Advice Letter, No. A-00-018, the *Buck* Advice Letter, No. A-98-056, and the *Loeffler* Advice Letter, No. A-96-337.³

Step 3. The Trustee's relevant economic interests.

The Act's conflict-of-interest provisions apply only to conflicts of interest arising from an official's economic interests, as described in Section 87103 and Regulations 18703-18703.5. The economic interests relevant to the Trustee are:

- An economic interest in a *business entity* in which he or she has a direct or indirect investment of \$2,000 or more, or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(a) and (d); Regulation 18703.1(a)-(b).)
- 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.)

Trustee Bechtel holds the position of director of a private bank. As a retired employee of the bank, she owns stock in the bank, receives dividend income, and receives pension payments from the bank which constitutes more than five percent of her annual income. Under the Act, the Trustee has an economic interest in the private bank because she is a director of the bank. (Section 87103(d) and Regulation 18703.1(b).) The bank may also qualify as an economic interest of hers because she has an investment in the bank's stock which is presumably worth more than \$2,000 and she receives income from the bank.⁴ (Sections 87103(a) and (c); Regulations 18703.1 and 18703.3.)

³ Only in the *Jeffries* Advice Letter, No. A-99-032, where the Board of a Water District reviewed the bills/invoices that staff had paid, but the board of directors did not formally "approve" the expenditures and the warrant register was listed as a "receive and file" matter on the board's agenda, did we find that reviewing the bills paid by staff did not constitute making or participating in a governmental decision. In that case no action was required by the Board members and they did not comment on or question the payment of the bills.

⁴ The Act defines "income" as a payment received, including but not limited to any salary, wage, advance, dividend, interest, rent or proceeds from any sale. (Section 82030(a).) With respect to the dividend and pension income the trustee receives, the term "income" does not include dividends, interest, or any other return on a security which is registered with the Securities and Exchange Commission. (Section 82030(b)(5).) Pension payments fall within the Act's definition of income unless they are received under a defined benefits pension plan qualified under Internal Revenue Code Section 401(a). (Section 82030(b)(11).)

Step 4. Will the Trustee's economic interests be *directly* or *indirectly* involved in the governmental decision?

Under Regulation 18704.1(a), a person, including business entities and sources of income, is *directly* involved in a decision before an official's agency when that person, either directly or by an agent:

"(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

"(2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person."

The private bank is *directly* involved in the Governing Board's decisions to approve payments to that bank. (Regulation 18704.1(a).) (Regulation 18704.1(a); *Wilder* Advice Letter, No. A-00-018; *Jeffries* Advice Letter, No. A-99-032; *Buck* Advice Letter, No. A-98-056; and *Loeffler* Advice Letter, No. A-96-337.)

Step 5. What materiality standard applies?

A conflict of interest may arise only when the reasonably foreseeable financial effect of a governmental decision on a public official's economic interest is *material*. (Regulation 18700(a).) Different materiality standards apply depending on the type of economic interest and whether that interest is directly or indirectly involved in the agency's decision. Under Regulations 18705.1(b) and 18705.3(a), the financial effect of a governmental decision on a business entity that is *directly* involved in a governmental decision is presumed to be material.⁵

Step 6. Is it reasonably foreseeable that the financial effect of the governmental decisions on the Trustee's economic interests will meet the applicable materiality standard?

A material financial effect on an economic interest is "reasonably foreseeable" if it is substantially likely that one or more of the materiality standards will be met as a result of the governmental decision. (Regulation 18706(a).) Under the Act and regulations, it is substantially likely that the governing board's decision to approve a payment to the private bank will have a material financial effect on the bank of which Ms. Bechtel is a director. Consequently, the Trustee has a conflict of interest and must disqualify herself from voting to approve warrants payable to the bank. As a practical matter, it would be best to remove from the consent calendar the items for which the

⁵ This presumption may be rebutted by proof that it is not reasonably foreseeable that the governmental decision will have any financial effect on the business entity.

Trustee is disqualified. This would enable the Trustee to participate in decisions regarding the consent calendar.

We have provided similar advice concerning the payment of warrants in the past. The *Wilder* Advice Letter, No. A-00-018, advised that a school district board member had a disqualifying conflict of interest in district decisions about the approval of the payment of warrants for contracts with Xanthos, a nonprofit corporation where she worked. The *Buck* Advice Letter, No. A-98-056, advised that a water district director may not participate in governmental decisions to approve the payment of warrants to the Water Education Foundation which was a source of income to him because his wife was a salaried staff member there. The *Loeffler* Advice Letter, No. A-96-336, concluded that a councilmember employed by P.G.&E. and owning more than \$10,000 of stock in P.G.&E. may not participate in votes on routine warrant payments from the city to P.G.&E. for electrical and gas utility service. The *Kohn* Advice Letter, No. A-93-052 stated that councilmembers with investments of \$10,000 or more in GTE may not participate in decisions on the consent calendar regarding the payment of bills to GTE for telephone service provided to the city. In the *Williamson* Advice Letter, No. I-92-628, we advised a councilmember employed as vice president of Simi Valley Bank, where the city banked, that she could not authorize a warrant payable to the bank, though she could approve warrants drawn on the bank.

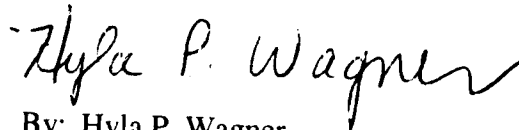
Steps 7 and 8. Do the "public generally" or the "legally required participation" exceptions apply?

The facts presented do not indicate that the public generally rule contained in Regulation 18707, or the narrow exception contained in Regulation 18708 for situations where officials are legally required to participate in a decision despite having a conflict of interest, apply here.

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

Sincerely,

Scott Hallabrin
General Counsel



By: Hyla P. Wagner
Senior Counsel, Legal Division

HPW:jgl