



FAIR POLITICAL PRACTICES COMMISSION

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May 25, 2010

Brian Baird
Assistant Secretary, Ocean and Coastal Policy
CA Natural Resources Agency
1416 Ninth Street, Suite 1311
Sacramento, CA 95814

Via facsimile and
U.S. mail

Re: Your Request for Advice
Our File No. A-10-083

Dear Mr. Baird:

This letter responds to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ Nothing in this letter should be construed to evaluate any conduct that may have already taken place, and any conclusions contained in this letter apply only to prospective actions. In addition, 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 assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

Please note that our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application, if any, of other conflict-of-interest laws such as common law conflict of interest, Government Code Section 1090, or Public Contract Code Sections 10410 and 10411. *We urge you to consult the Attorney General's office regarding these provisions.*

QUESTION

Do the Act's conflict-of-interest provisions prohibit the California Natural Resources Agency from considering an applicant for a position as a Project Coordinator with the West Coast Governors' Agreement on Ocean Health (the "WCGA") if the applicant is currently one of three members of the WCGA's Executive Committee and took part in WCGA decisions regarding the Project Coordinator position?

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.

CONCLUSION

The Act's conflict-of-interest provisions prohibit a public official from making, participating in making, or influencing governmental decisions that may have a reasonably foreseeable material financial effect on the official's economic interests. While these provisions apply to the individual employee, agency actions influenced by an official in violation of the conflict-of-interest provision are potentially void or voidable. However, under the facts you have presented, it does not appear that the public official in question is engaging in prohibited activity under the Act in submitting and interviewing for the Project Coordinator position.

FACTS

The WCGA is a voluntary regional ocean partnership formed by the Governors of Washington, Oregon, and California. The WCGA is overseen by an Executive Committee composed of one state employee from each of the three states who represent their governors. These employees receive no additional compensation for their role with the WCGA. In April 2010, the Natural Resources Agency, on behalf of the WCGA Executive Committee, released a Request for Proposal to hire a Project Coordinator (the "RFP"). Prior to the release, the RFP was reviewed and commented on by members of the WCGA Executive Committee and staff. After the RFP's release, the Oregon Executive Committee member announced her intention to submit an application for the Project Coordinator position.

You state that in reviewing the RFP, the Oregon Executive Committee member comments were focused primarily on grammatical and structural aspects of the document, and that she made no comments or suggestions regarding the substance of the RFP that would benefit her as an applicant. You also state that she suggested reducing the pay range for the position; a suggestion ultimately adopted by the Executive Committee.

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).) Specifically, 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).)

You have asked whether the Natural Resources Agency may consider the Oregon Executive Committee member's application for the Project Coordinator position with the WCGA. While the Act's conflict-of-interest provisions apply to the individual official or employee and do not specifically limit or restrict the Natural Resources Agency from

considering a public official's application, it is important to consider whether or not a public official may be engaging in prohibited activity because any action taken by the Natural Resources Agency involving a violation of the Act's conflict-of-interest provisions may be void or voidable under Section 91003(b), which states in pertinent part:

"Upon a preliminary showing in an action brought by a person residing in the jurisdiction that a violation of Article 1 (commencing with Section 87100), Article 4 (commencing with Section 87400), or Article 4.5 (commencing with Section 87450) of Chapter 7 of this title or of a disqualification provision of a Conflict of Interest Code has occurred, the court may restrain the execution of any official action in relation to which such a violation occurred, pending final adjudication. If it is ultimately determined that a violation has occurred and that the official action might not otherwise have been taken or approved, the court may set the official action aside as void. The official actions covered by this subsection include, but are not limited to orders, permits, resolutions and contracts . . ."

Thus, the pertinent question is whether the Oregon Executive Committee member is engaging in prohibited conduct in submitting her application to the Natural Resources Agency for the Project Coordinator position. 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. (Regulation 18700(b)(1)-(8).)

Step One: Is the individual a "public official?"

The Act's conflict-of-interest provisions apply to all "public officials." (Sections 87100, 87103; Regulation 18700(b)(1).) A "public official" is "every member, officer, employee or consultant of a state or local government agency . . ." (Section 82048.) Potentially, the Oregon Executive Committee member may be considered a "public official" under the Act taking into account her position with the WCGA. However, in light of our conclusion, we find it unnecessary to make this determination and proceed with our analysis under the presumption that the member is in fact a "public official" subject to the Act's conflict-of-interest provisions.

Step Two: Is the official making, participating in making, or influencing a governmental decision?

The Act's conflict-of-interest provisions apply only when a public official "make[s], participate[s] in making, or in any way attempts to use his [or her] official position to influence a governmental decision in which he [or she] knows or has reason to know he [or she] has a financial interest." (Section 87100; Regulation 18700(b)(2).) In other words, an official is not prohibited from contacting an agency under the Act's conflict-of-interest provisions if the official is not making, participating in making, or influencing a governmental decision. The Commission has adopted a series of regulations defining "making," "participating in making,"

and “influencing” a governmental decision, and which provide certain exceptions. (Regulations 18702-18702.4.)

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, appoints a person, 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).)

Participating in Making a Governmental Decision: 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.)

Influencing a Governmental Decision: There are two rules that address whether a public official is using or attempting to use his or her official position to influence a governmental decision. The first rule applies when the governmental decision is within or before the public official’s own agency or an agency appointed by or subject to the budgetary control of the public official’s agency. (Regulation 18702.3(a).) In these cases, if “the official contacts, or appears before, or otherwise attempts to influence, any member, officer, employee or consultant of the agency” then he or she is attempting to influence a governmental decision. This includes, but is not limited to, “appearances or contacts by the official on behalf of a business entity, client, or customer.”

The second rule applies when the governmental decision is within or before an agency other than the public official’s own agency, or an agency appointed by or subject to the budgetary control of the public official’s agency. (Regulation 18702.3(b).) Under this rule, the official cannot act or purport “to act on behalf of, or as the representative of, his or her agency to any member, officer, employee or consultant of an agency” to influence a decision that will have a material financial effect on his or her economic interests.

However, an official is not making or participating in making a governmental decision if he or she makes an appearance “as a member of the general public before an agency in the course of its prescribed governmental function to represent himself or herself on matters related solely to the official’s personal interest . . .” (Regulation 18702.4(a).) Moreover, an official is not influencing a governmental decision if the official “[a]ppears in the same manner as any other member of the general public before an agency in the course of its prescribed governmental function solely to represent himself or herself on a matter which is related to his or her personal interest.” (Regulation 18702.4(b)(1).)

Accordingly, the Oregon Executive Committee member is not prohibited from submitting an application to the Natural Resources Agency or interviewing for the position so long as the application is submitted and interviews are conducted under the same procedure established for

all applicants. In addition, care should be taken to ensure that the Oregon Executive Committee member is not granted special access to officials or employees of the Natural Resources Agency. Barring additional facts indicating that the Oregon Executive Committee member is making, participating in making, or influencing a governmental decision as outlined above, the member is not engaging in prohibited conduct under the Act's conflict-of-interest provisions.²

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

Sincerely,

Scott Hallabrin
General Counsel



By: Brian G. Lau
Counsel, Legal Division

BGL:jgl

² This conclusion is limited to the Oregon Executive Committee member's submission of an application and subsequent interviews for the position. We do not analyze the member's participation in prior WCGA decisions regarding the Project Coordinator position. Pursuant to Regulation 18929(b)(8)(A), the Commission will not advise with respect to past conduct. Thus, we must decline to offer advice relating to these prior decisions.