



FAIR POLITICAL PRACTICES COMMISSION

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November 2, 2010

Nancy L. Klein
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School and College Legal Services of California
5350 Skylane Blvd.
Santa Rosa, CA 95403

Re: Your Request for Informal Assistance
Our File No. I-10-166

Dear Ms. Klein:

This letter responds to your request for advice, on the behalf of the Ukiah Unified School District (the "UUSD"), regarding conflict-of-interest provisions of the Political Reform Act (the "Act").¹ Because your question is general in nature, we are treating your request as one for informal assistance.²

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 laws that may apply such as Government Code Sections 1090, common law conflict of interest, or Education Code Section 35107.

QUESTION

Can board members, with spouses employed by the UUSD, take part in collective bargaining decisions including, but not limited to, the adoption of salary schedules and making staffing and budgetary decisions that may impact the classes or programs in which board members' spouses serve?

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 Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114, Regulation 18329(c)(3).)

CONCLUSION

A board member is not disqualified from taking part in a collective bargaining decision regarding salary schedules that will affect his or her spouse's income as an employee of the UUSD, so long as the official's spouse will not receive a salary different from other UUSD employees in the same job classification or position. However, other collective bargaining decisions -- including, but not limited to, staffing and budgetary decisions that could impact the classes or programs in which the board member's spouse serves -- must be analyzed individually to assess whether specific decisions fall within the exception to the personal financial effects rule for decisions affecting governmental salary.

FACTS

The Ukiah Unified School District Board of Trustees (the "Board") consists of seven board members, two of whom are married to certificated employees of the UUSD. One of the two spouses is an elementary classroom teacher, and the other spouse serves as a Technology Integration Teacher providing specialized services in a categorically funded program. Both of these employees had been employed by the UUSD for more than a year at the time their spouses became members of the Board. Additionally, the spouse of a third board member was employed, until recently, as the Personnel Director for the District's Personnel Commission and, as such, was a classified employee of the UUSD.³ The UUSD's certificated and classified employees are exclusively represented by the Ukiah Teachers' Association and California School Employees Association, respectively.

In light of the potential that board members will have spouses employed by the UUSD, you ask whether the Act restricts board members from taking part in matters related to collective bargaining agreements including, but not limited to, the adoption of salary schedules and making staffing and budgetary decisions that may impact the classes or programs in which board members' spouses serve.

ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or 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 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 any given governmental decision.

³ Note that the Commission does not provide advice regarding past conduct. 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.

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.) Members of the Board are public officials within the meaning of the Act.

Step Two: Is the official 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. (Regulation 18702.1.) A public official “participates in a governmental decision” when, acting within the authority of his or her position and without significant intervening substantive review, the official negotiates, advises, or makes recommendations to the decisionmaker regarding the governmental decision. (Regulation 18702.2.) A public official is attempting to use his or her official position to influence a decision if, for the purpose of influencing, the official contacts or appears before any member, officer, employee, or consultant of his or her agency. (Regulation 18702.3.) Members of the Board are making, participating in making, or influencing a governmental decision when taking part in the Board’s decisions related to collective bargaining.

Step Three: What are the official’s economic interests?

Section 87103 provides that a public official has a “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 any of the official’s economic interests, described as follows:

- 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)); or 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)).
- 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 economic interest in a source of income, including promised income, which aggregates to \$500 or more within 12 months prior to the decision. (Section 87103(c); Regulation 18703.3.)
- An economic interest in a source of gifts to him or her if the gifts aggregate to \$420 or more within 12 months prior to the decision. (Section 87103(e); Regulation 18703.4.)

- An economic interest in his or her personal finances, including those of his or her immediate family. This is known as the “personal financial effects” rule. (Section 87103; Regulation 18703.5.)

Your account of the facts potentially implicates an official’s economic interest in the UUSD as a source of income and an official’s economic interest in his or her personal finances. However, in regards to any effect on an official’s economic interest in a source of income, the Act’s definition of income expressly excludes “salary and reimbursement for expenses and per diem received from state, local or federal government agency . . .” (Section 82030(b)(2).) Nonetheless, an effect on an official’s governmental salary may still be disqualifying under limited circumstances as a material and foreseeable financial effect on the official’s personal finances. Thus, we continue the analysis to consider personal financial effects.

Step Four: Is the official’s economic interest directly or indirectly involved in the decision?

“A public official or his or her immediate family is 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.” (Regulation 18704.5.)

Under this regulation, an official’s economic interest in his or her personal finances is directly involved in the decision if the decision would have any financial effect on the official’s or his or her spouse’s personal finances.

Steps Five and Six: Will there be a reasonably foreseeable material financial effect on the official’s economic interest?

A conflict of interest may arise only when the reasonably foreseeable financial effect of a governmental decision on a public official’s economic interests is material. (Regulation 18700(a).) Different standards apply to determine whether a reasonably foreseeable financial effect on an economic interest will be material, depending on the nature of the economic interest. For a financial effect on an official’s personal finances, the financial effect is material if it is at least \$250 in any 12-month period. (Regulation 18705.5(a).)

While Regulation 18705.5(a) sets the materiality standard for a financial effect on an official’s personal finances at \$250, Regulation 18705.5(b) also includes an exception to the personal financial effects rule for certain governmental decisions that affect only the salary, per diem, or reimbursement of the public official providing the following:

“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.”

Once a public official has determined the materiality standards applicable to each of his or her economic interests, the next step is determining whether it is “reasonably foreseeable” that the standards will be met. 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).) An 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.)

Ultimately, whether a material financial effect is foreseeable at the time a decision is made depends on facts and circumstances peculiar to each case. (*In re Thorner, supra*, at 198.) Because the Commission does not act as a finder of fact in providing advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), the foreseeability of a particular financial effect is a determination that must be left, in most instances, to the informed judgment of the public official.

Based upon the facts you have provided, the Board’s decisions regarding collective bargaining must be analyzed individually to assess whether specific decisions fall within the exception to the personal financial effects rule for governmental salary. Generally, we can conclude only that a board member is not disqualified from taking part in a collective bargaining decision regarding salary schedules that will affect his or her spouse’s income as an employee of the UUSD, so long as the official’s spouse will not receive a salary different from other UUSD employees in the same job classification or position.

Notwithstanding decisions regarding salary schedules, the analysis of other collective bargaining decisions -- including, but not limited to, staffing and budgetary decisions that could impact the classes or programs in which the board member’s spouse serves -- is more complex. For example, we have previously opined that if an official was aware of actual facts indicating that the official’s spouse would lose his or her job as a result of the official’s vote, then it would be reasonably foreseeable that the decision would have a financial effect upon the official’s personal finances. However, we have also opined that the mere perception of a threat was not sufficient to establish that the effect of a decision was reasonably foreseeable. (*Stepanicich* Advice Letter, No. A-96-217; also see *Sly* Advice Letter, No. A-10-102.)

Accordingly, while a board member is not categorically prohibited from taking part in a decision that could impact the classes or programs in which his or her spouse serves, the factual circumstances of each decision must be considered to determine any unique effect on the official’s spouse that is reasonably foreseeable. Should a board member need additional assistance regarding any particular collective bargaining decision, it is advisable that the member seek additional advice providing the factual circumstances of the decision.

Steps Seven and Eight: Does this governmental decision come within any exception to the conflict-of-interest rules?

Even if an official has a conflict of interest, disqualification is not required if the governmental decision affects the public official's economic interests in a manner that is indistinguishable from the manner in which the decision will affect the public generally. (Section 87103; Regulation 18707(a).)


Additionally, in certain rare circumstances, a public official may be called upon to take part in a decision despite the fact that the official may have a disqualifying conflict of interest under the "legally required participation" exception. This exception applies only in certain very specific circumstances where the government agency would be paralyzed from acting. (Section 87101; Regulation 18708.)

However, you have not presented any facts indicating that the "public generally" or the "legally required participation" exceptions are applicable to your circumstances, so we will not address them further.

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

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