



## FAIR POLITICAL PRACTICES COMMISSION

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This letter supersedes the *Klein* Advice Letter, No. I-10-184, to the extent that it is inconsistent with the assistance provided herein.

January 11, 2011

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

Re: The *Klein* Advice Letter, No. I-10-184, dated November 29, 2010.  
**Our File No. I-10-184(a)**

Dear Ms. Klein:

This letter serves to clarify assistance provided to the Ukiah Unified School District (the "UUSD") in the *Klein* Advice Letter, No. I-10-184 (copy enclosed) regarding the conflict-of-interest provisions of the Political Reform Act (the "Act")<sup>1</sup>, and supersedes our prior letter to the extent that it is inconsistent with the assistance provided herein. Because your questions are general in nature, we are treating your request as one for informal assistance.<sup>2</sup>

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 Section 1090, common law conflict of interest, or Education Code Section 35107.

### QUESTIONS

1. Assuming a school board member has a disqualifying conflict of interest in any given decision by the school board, may the school board proceed to deliberate and vote on the matter?

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<sup>1</sup> 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.

<sup>2</sup> Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114, Regulation 18329(c)(3).)

2. Assuming a school board member has a disqualifying conflict of interest in any given decision by the school board, under what circumstances may the board member continue to take part in the school board's deliberations or vote on the matter?

### CONCLUSIONS

1. Disqualification under the Act's conflict-of-interest provisions is personal as to the official. Assuming an official is disqualified for making, participating in making, or influencing a decision by the school board, the Act's conflict-of-interest provisions do not preclude the school board from deliberating and voting on the matter. However, should the disqualified official take part in the decision, any action taken by the school board may be void or voidable.

2. An official with an otherwise disqualifying conflict of interest may not make, participate in making, or use his or her official position to influence a decision absent an applicable exception.

### FACTS

The Ukiah Unified School District Board of Trustees (the "Board") consists of seven board members. Previously, you have requested assistance on behalf of the Board related to potential conflicts of interest that may arise if a board member has a spouse employed by the UUSD. Our response to your original question was provided in the *Klein* Advice Letter, No. I-10-166, in which we concluded 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. However, we also cautioned that 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.

In light of our previous assistance, you seek supplemental assistance regarding Board decisions assuming a board member is disqualified from taking part in the decision under the Act's conflict-of-interest provisions.

### 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.

For the purposes of this analysis, you have asked that we assume that a board member has a disqualifying conflict of interest from the governmental decision before the Board.<sup>3</sup>

*1. Assuming a school board member has a disqualifying conflict of interest in any given decision, may the Board proceed to deliberate and vote on the matter?*

We have previously advised the following:

“Disqualification is personal as to the official and does not prohibit the agency from acting without the official's input and participation. This scheme obviously envisions that the disqualified official may be supplanted in the decision-making process where delegation or transfer of the decision is appropriate. [Citations omitted] This is the case so long as the disqualified official does not make, participate in making, or use his/her official position to influence the making of the decision by the person to whom the decision is delegated.” (*Benjamin Advice Letter*, No. A-86-148.)

Accordingly, the Act's conflict-of-interest provisions do not preclude the school board from deliberating and voting on the matter. However, should the disqualified official take part in the decision, any action taken by the school board 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... .”

*2. Assuming a school board member has a disqualifying conflict of interest in any given decision, under what circumstances may the board member continue to take part in the Board's deliberations or vote on the matter?*

The Act's conflict-of-interest provisions apply 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

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<sup>3</sup> Our current response is based upon the assumption that a board member has a disqualifying conflict of interest in the governmental decision. This response does not address or revisit the assistance provided in regards to your previous request.

financial interest.” (Section 87100; Regulation 18700(b)(2).) The Commission has adopted a series of regulations defining “making,” “participating in making,” and “influencing” a governmental decision. (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.

Notwithstanding the definitions above, Regulation 18702.4 provides a list of exceptions to the general rules regarding an official making, participating in making, or influencing a decision. For example, 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).) Similarly, 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).) An official’s “personal interests” include, but are not limited to the following:

“(A) An interest in real property which is wholly owned by the official or members of his or her immediate family.

“(B) A business entity wholly owned by the official or members of his or her immediate family.

“(C) A business entity over which the official exercises sole direction and control, or over which the official and his or her spouse jointly exercise sole direction and control.” (Regulation 18702.4(b)(1).)<sup>4</sup>


Additionally, an official may be able to take part in a decision despite a potentially disqualifying conflict of interest under the Act’s general exceptions to the conflict-of-interest provisions. For example, disqualification is not required if the governmental decision affects the 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).) An official may also be called upon to take part in a decision, in certain rare circumstances, despite the fact that the official may have a potentially disqualifying conflict of interest under the “legally required participation” exception. (Section 87101; Regulation 18708.)

Because you have not limited your question to a specific governmental decision, we can only conclude that an official with an otherwise disqualifying conflict of interest may not generally make, participate in making, or influence a decision absent an applicable exception. If an official with a potentially disqualifying conflict of interest needs additional assistance regarding exceptions to the general conflict-of-interest provisions, the official should seek additional advice providing the relevant facts pertaining to the specific governmental decision.

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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<sup>4</sup> Note that this exception is very narrow and applies only to certain public meetings of the agency such as community meetings, informational meetings, and workshops or hearings. Moreover, comments should be strictly limited to the official’s personal interests, and the official should make clear that he or she is not speaking in the interest of any other person or group, and that he or she is not acting in an official capacity. (See *Simonian Advice Letter*, No. A-09-174 and *Adams Advice Letter*, No. I-06-129.)