



FAIR POLITICAL PRACTICES COMMISSION

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October 11, 2011

Dominic Holzhaus
333 W. Ocean Blvd. 11th Floor
Long Beach, CA 90802

Re: Your Request for Informal Assistance
Our File No. I-11-153

Dear Mr. Holzhaus:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the "Act").¹ Because your inquiry is general in nature and does not involve specific decisions, we will treat your letter as a request for informal assistance.²

Please note that our advice is based solely on the provisions of the Act. We therefore can offer no opinion on the application, if any, of other conflict-of-interest laws such as common law conflict of interest and Government Code Section 1090.

In addition, this letter is based solely 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.) Nothing in this letter may be construed to evaluate any conduct that has already taken place.

QUESTION

Does Long Beach Harbor Commissioner Rich Dines have a disqualifying interest under the Act that would prevent him from participating in decisions regarding entities that contract for longshore labor?

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

Based on the facts presented, Commissioner Dines' sources of income are directly involved in decisions before the Long Beach Board of Harbor Commissioners ("Harbor Commission"). Therefore Commissioner Dines may not make, participate in making, or influence any decision involving Pacific Maritime Association ("PMA") member companies from which he derives income if the decision will have *any* financial effect on the companies. Furthermore, the public generally exception does not apply to Commissioner Dines' situation. See discussion below.

FACTS

You seek advice on behalf of the City of Long Beach and its Commissioner Rich Dines, a member of the Harbor Commission. You wish to know whether Mr. Dines has a disqualifying conflict of interest that would prevent him from participating in decisions regarding businesses that contract for longshore labor.

In your request for advice and during our telephone conversation of September 22, 2011, you stated that Mr. Dines was sworn into office on August 3, 2011. Under the Charter of the City of Long Beach, the five-member Harbor Commission has broad authority over the Harbor Department and the Harbor District, commonly known as the Port of Long Beach. Harbor Commissioners are employees of the City of Long Beach and are paid \$100 per meeting.

As a Harbor Commissioner, Mr. Dines votes on final decisions, and makes contractual and policy commitments on a wide range of Harbor Department business, including leases, tariffs for port services, consulting and construction contracts. Many of these decisions will involve substantial amounts of money. The Port is the second largest port in the U.S., 18th largest in the world, and has a budget of \$655 million for fiscal year 2011.

Since 1997, Mr. Dines has been a longshore worker in the Port of Long Beach and the adjacent Port of Los Angeles. In 2007, he was elected President of the International Longshore and Warehouse Union (ILWU) Southern California District Council, which coordinates regional political and legislative activity for the ILWU. He also served several terms as a member for the Executive Board and Political Action Committee for ILWU Local 13. These ILWU positions were unpaid and ended before Mr. Dines was sworn in as Harbor Commissioner. It is anticipated that Mr. Dines will continue as a longshore worker in the Ports of Long Beach and Los Angeles during his term as a Harbor Commissioner.

Like all longshore workers, Mr. Dines' employment is subject to the collective bargaining agreement ("CBA") known as the Pacific Coast Longshore Contract for the period July 1, 2008, through July 1, 2014. The CBA is an agreement between the ILWU and the Pacific Maritime Association ("PMA") governing the wages and working conditions of over 20,000 longshore workers on the U.S. West Coast. The Board of Harbor Commissioners has no role in

the negotiations or administration of the CBA. PMA is a nonprofit mutual benefit corporation and, under the PMA Bylaws, membership in the corporation is open to:

“Any firm, person, association or corporation engaged in the business of carrying cargo by water to or from any port on the Pacific Coast of the United States, or any agent of any such firm, person, association or corporation, and any firm, person, association or corporation employing longshoremen or other shoreside employees in operations at docks or marine terminals or container freight stations”

PMA, a nonprofit membership organization, provides union labor to its 75 member employers, including all the major tenants of the Port of Long Beach, the stevedoring companies operating in the Port of Long Beach and shipping lines calling at the Port of Long Beach (“PMA Members”). The businesses that operate from the Port’s terminals comprise the vast majority of industry in the district. The Port has 24 terminals, 7 of which are container terminals, the type of industry that employs Mr. Dines. These businesses represent *29 percent* of the business in the jurisdiction.

Each day, individual PMA member employers determine their need for longshore labor (i.e. type of jobs, number of workers needed, length of job, and skill-level of workers) and submit a request to the ILWU dispatch hall. Longshore workers such as Mr. Dines are assigned to those jobs according to the priorities and protocols established in detail in the CBA. Factors considered include union membership, seniority, and special skills required by the job. PMA issues paychecks to longshore workers on behalf of all PMA Members. The CBA describes PMA as a “disbursing agent.” In addition, in our September 22, 2011 telephone call you stated that PMA acts as a “conduit entity” in transmitting the payments to longshore workers, including Mr. Dines. You stated that PMA essentially bills its member companies for the labor they use and then PMA pays the longshore workers with funds obtained from the companies. PMA sends workers to jobs based on requests from its member employers. PMA does not have discretion regarding which employees to send to jobs, and must follow the procedures outlined in the CBA.

As a result of this dispatch process, Mr. Dines has worked at most of the Port of Long Beach facilities employing longshore labor within the past 12 months and has earned income at each of those facilities of over \$500 during that time.

PMA Members are frequently involved directly in matters before the Port of Harbor Commissioners. For instance, PMA members lease property from the Port, and the PMA Members would be named parties in any action to grant, amend or renegotiate such leases. Some of these decisions could involve significant amounts of money. For example, the largest container terminal in the Port of Long Beach yields over \$40 million per year in rental revenue.

PMA itself and the ILWU are indirectly involved in many matters before the Board of Harbor Commissioners. Both are affected by and occasionally provide public support for Port projects that will develop trade.

The financial effects of the decisions of the Board of Harbor Commissioners are likely to be the same for Mr. Dines as any other longshore worker. Mr. Dines is subject to terms and conditions under the CBA affecting all 20,000 longshore workers on the West Coast. In addition, Mr. Dines does not have an arrangement with any PMA Member to work as a "steady" for that particular PMA Member. Mr. Dines is assigned to a facility each day in accordance with the terms of the CBA.

You wish to receive guidance regarding whether Mr. Dines has a disqualifying interest under the Act that would prevent him from participating in decisions regarding business entities that lease container terminals and contract for longshore labor in the Port of Long Beach.

ANALYSIS

The Act prohibits a 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. (Section 87100.) Public officials will have a conflict of interest in any decision that will have a reasonably foreseeable material financial effect on their financial interests. (Section 87103.) Pursuant to Regulation 18700, an eight-step analysis is applied to determine whether a public official has a conflict of interest in a given decision.

Step One: Is Commissioner Dines a "public official?"

The Act defines the term "public official" as "every member, officer, employee or consultant of a state or local government agency . . ." (Section 82048.) It is clear under the statute, and assumed by your letter, that Commissioner Dines is a public official under the Act.

Step Two: Is Commissioner Dines 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.)

Therefore, if Commissioner Dines participates in discussions, votes on decisions, or attempts to influence any member of the Harbor Commission involving leases, tariffs for port services, consulting and construction contracts, he will be making, participating in making, or influencing governmental decisions under the Act.

Step Three: What are Commissioner Dines' economic interests -- the possible sources of a conflict of interest?

A public official has a financial interest in a decision within the meaning of Section 87103 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 one of five enumerated economic interests. (Section 87103; Regulations 18703-18703.5.).

The applicable economic interests include:

- An interest in a business entity in which a public official has a direct or indirect investment of \$2,000 or more. (Section 87103(a), Regulation 18703.1(a).) An interest in any business entity in which a public official is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d), Regulation 18703.1(b).)
- An interest in real property in which a public official has a direct or indirect interest of \$2,000 or more. (Section 87103(b), Regulation 18703.2.)
- Any source of income, including promised income, to the public official that aggregates to \$500 or more within 12 months prior to the decision. (Section 87103(c), Regulation 18703.3.)
- Any source of gifts to the public official if the gifts aggregate to \$420 or more within 12 months prior to the decision. (Section 87103(e), Regulation 18703.4.)
- A public official also 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 also known as the "personal financial effects" rule. (Section 87103, Regulation 18703.5.)

Sources of Income

Member Businesses of PMA:

As a longshore worker in Long Beach and Los Angeles Counties, Mr. Dines is assigned to jobs by the PMA based on its member companies' need for longshore labor. The PMA acts as a "disbursing agent" and a "conduit entity" through which workers are requested and then paid for their services. Because the payments are generated by the companies themselves directly in

exchange for labor performed by Commissioner Dines, and PMA is merely a “disbursing agent” or “conduit” for the payments, we find the member companies to be the actual source of income.

We distinguish Commissioner Dines’ situation from the factual scenario described in the *Sauer* Advice Letter, A-95-373. In the *Sauer* letter, we advised that a director of a hospital district, a nurse employed by a nursing registry, could participate in a decision to merge two hospital districts because neither hospital was considered a source of income to her even though she had worked at the hospitals through the nursing registry. We advised that the nursing registry is the source of income to the hospital director because the registry sets the nurses’ pay rate, pays the nurses on an hourly basis, and that “the hospitals that contract with the nursing registry have no say in which nurse will be assigned to them ...nor the amount of work that any specific nurse will receive . . .” Clearly, the nursing registry has more control over the employment relationship and determines which nurses they send to which facilities and how often that nurse is sent out on job assignments. In contrast, the situation you describe with regard to longshore workers suggests that PMA has no discretion outside the requirements of the CBA.

In determining whether to “pierce” through PMA’s member companies, we took into account that PMA does not have discretion to assign specific workers to specific jobs or set hourly rates outside the requirements of the CBA. PMA member companies determine the need for the workers, how long they are needed, and requirements for skill level (if any). You also stated that Commissioner Dines does not have an arrangement with PMA member companies to work as a “steady.” This implies that PMA member companies may employ a longshore worker as a “steady.” Therefore, PMA member businesses have a degree of control over a longshore worker’s employment relationship while PMA has no discretion in determining the employment situation. Based on these facts, we conclude that PMA is not Commissioner Dines’ employer or source of income under the Act.

If Commissioner Dines earns \$500 or more from a PMA member 12 months prior to a decision involving that member, that company is a source of income to him.

Personal Finances:

Additionally, Commissioner Dines also has an economic interest in his personal finances if the decision will result in an increase or decrease in his “personal expenses, income, assets, or liabilities.” (Section 87103.)

Step Four: Are Commissioner Dines’ Economic Interests Directly or Indirectly Involved in the Governmental Decision?

Business Entity, Source of Income:

A person, including business entities, sources of income, and sources of gifts, are directly

involved in a decision before an official's agency when that person, either directly or indirectly 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.” (Section 87103; Regulation 18704.1(a).)

If the official's interest in a business entity, source of income or source of a gift is not directly involved in a decision before the official's agency, they are deemed to be indirectly involved. (See *Cooke* Advice Letter, No. A-99-127.)

You state that “PMA Members are frequently involved directly in matters before the Board of Harbor Commissioners.” Because PMA members initiate proceedings, are named parties in, or the subject of proceedings, they are deemed directly involved in decisions before the Commission.

Personal Finances:

For governmental decisions that affect personal expenses, income, assets, or liabilities, the standards set forth in Regulation 18704.5 apply. Regulation 18704.5 states:

“(a) A public official or his or her immediate family are 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.”

Therefore, Commissioner Dines' personal finances would be deemed directly involved if the decisions would have *any* effect on his personal finances or those of his immediate family.

Step Five: Applicable Materiality Standard.

A conflict of interest may arise only when the reasonably foreseeable impact of a governmental decision on a public official's economic interest is material. (Section 87103; Regulation 18700(a).) Different standards apply to determine whether reasonably foreseeable financial effect on an economic interest is material.

Business Entity, Source of Income:

Where a source of income is *directly involved* in a decision before an official's agency, the financial effect of the decision is deemed material. 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—not even a penny’s worth. (Regulation 18705.3(a).)

Personal Finances:

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.

However, when determining whether a governmental decision has a financial effect on a public official’s economic interest in his or her personal finances, neither a financial effect on the value of real property owned directly or indirectly by the official, nor a financial effect on the gross revenues, expenses, or value of assets and liabilities of a business entity in which the official has a direct or indirect investment interest shall be considered. (Regulation 18705.5(a).)

You have not provided any information that Commissioner Dines’ personal finances will be affected by decisions before the Harbor Commission. Therefore, we do not discuss this economic interest further.

Step Six: Is it Reasonably Foreseeable That the Financial Effect of the Governmental Decision Upon Commissioner Dines’ Economic Interests Will Meet the Applicable Materiality Standard?

Whether the financial consequences of a decision are reasonably foreseeable at the time a governmental decision is made depends on the facts of each particular case. A financial effect need not be a certainty to be considered reasonably foreseeable; a substantial likelihood that it will occur suffices to meet the standard. On the other hand, if an effect is only a mere possibility, it is not reasonably foreseeable. (*Ibid.*) Please note that the Commission does not act as a finder of fact when providing advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

Business Entity, Source of Income:

Regulation 18705.3 provides that “any reasonably foreseeable financial effect on a person who is a source of income to a public official, and who is directly involved in a decision before the official’s agency, is deemed material.” This standard for determining materiality for a directly involved source of income is known as the “one penny” rule. If the source of income is affected by even one penny, the financial effect is deemed material.

Because you stated that “many of these decisions [before the Harbor Commission] will involve substantial amounts of money,” we find this standard will likely be met. Therefore, unless Commissioner Dines can rebut this presumption, he may not make, participate in making, or influence any decision involving PMA member companies from which he receives income or other sources of income that come before the Harbor Commission.

Step Seven: The Public Generally Exception.

Even if a public official otherwise has a conflict of interest, he or she may still be able to take a role in the governmental decision if the reasonably foreseeable material financial effect of the decision on the official's economic interest is indistinguishable "from its effect on the public generally." (Section 87103; Regulations 18700(b)(7), 18707(a).) This rule is referred to as the "public generally" exception.

There are seven forms of the "public generally" exception: a general exception (Regulation 18707.1) and six specialized forms of the exception (Regulations 18707.2 - 18707.9).

Regulation 18707.1: General Rule:

Business Entity:

When a public official's economic interest is a business entity, subdivision 18707.1(b)(1)(C) requires that the affected segment of the public comprise more than a single industry, trade, or profession, in order to fall under the general exception.

Commissioner Dines' economic interest is in PMA member businesses that lease Harbor Commission terminals and employ longshore workers. These companies frequently appear before the Harbor Commission as named parties to decisions involving actions to grant, amend or renegotiate terminal leases. Thus, decisions regarding leases, for instance, will affect only companies that operate in these terminals, which represent a single industry within the jurisdiction. Under Regulation 18707.1(b)(1)(C) a "significant segment" of the public generally, as defined by the general exception, will not be affected by these decisions.

Regulation 18707.7: Industries, Trades, or Professions

Regulation 18707.7 provides a specialized form of the "public generally" exception, applicable when a decision will affect a single industry, trade, or profession in substantially the same manner as the decision will affect an official's economic interest. Under this specialized form of the exception, a single industry, trade, or profession may constitute a significant segment of the public only if it is the "predominant industry" within the official's jurisdiction or in the district represented by the official. The purpose of the predominant industry exception is "... to avoid disqualification in such cases as a farmer elected in a rural community in which agriculture is the major industry." (*In re Ferraro* (1978) 4 FPPC Ops. 62.) The exception is limited to the situation where a local economy is based on one industry so that almost any public official would have an economic tie to that industry. (*Woods Advice Letter*, No. A-94-164.)

With respect to public officials who are not elected state officers, an industry, trade, or profession that constitutes 50 percent or more of business entities in the jurisdiction of the

official's agency or the district the official represents is a "predominant" industry, trade or profession. (Regulation 18707.7(b).)

Under the facts that you provide, the container terminal companies constitutes 29 percent of the businesses in the Port of Long Beach, and is therefore not the predominant industry within the jurisdiction.

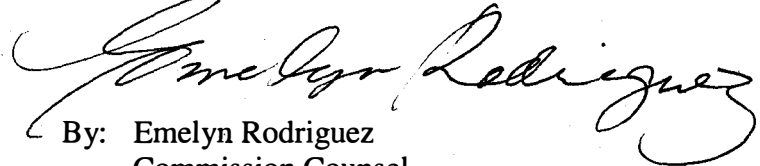
Step Eight: "Legally Required Participation" Exception

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 this exception is applicable to Commissioner Dines' situation, therefore we do not address it here.

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

Sincerely,

Zackery P. Morazzini
General Counsel


By: Emelyn Rodriguez
Commission Counsel

ER:jgl