



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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March 17, 2016

Matthew G. Jacobs
General Counsel
California Public Employees' Retirement System
Legal Office
P.O. Box 942707
Sacramento, CA 94229-2707

Re: Your Request for Advice
Our File No. A-16-050

Dear Mr. Jacobs:

This letter responds to your request for advice on behalf of the California Public Employees' Retirement System ("CalPERS") and Mr. Chirag Shah, contract legal counsel, regarding the conflict of interest provisions of the Political Reform Act (the "Act").¹

Please note that we are only providing advice under the conflict of interest provisions of the Act and not under other general conflict of interest prohibitions such as common law conflict of interest or Section 1090.

QUESTION

Is CalPERS contract legal counsel, Mr. Shah, a public official, subject to the Act's disclosure and disqualification provisions such that he must file a Form 700, Statement of Economic Interests?

CONCLUSION

Yes. Mr. Shah is a public official under the Act and must file a Form 700, Statement of Economic Interests.

FACTS

Mr. Shah provides legal advice and representation to the CalPERS Board of Administration ("Board") on procedural and substantive legal issues that arise in connection with the Board's consideration of proposed administrative decisions received from the Office of Administrative

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.

Hearings (“OAH”). Mr. Shah further advises the Board regarding petitions for reconsideration of OAH decisions. Mr. Shah provides these services in part to ensure that CalPERS staff does not engage in improper ex parte communications with the Board relative to the Board’s decision to adopt, reject, or take other action on an OAH decision.

Pursuant to his contract, Mr. Shah provides legal advice “directly to the Board” and “takes direction solely and exclusively from the Board with no involvement whatsoever by the CalPERS Staff or Legal Office.” For these services, Mr. Shah is paid a retainer for his work on a predetermined number of proposed decisions; plus an hourly rate for work above that baseline and for work assisting the Board when it undertakes its own full Board hearing of a matter previously decided by OAH. For calendar year 2015, Mr. Shah billed a total of 338.5 hours spread out over the course of the year.

ANALYSIS

The Act’s conflict of interest rules prohibit a public official from making, participating in making, or using his or her official position in any way to influence a governmental decision in which the official knows, or has reason to know, that he or she has a “financial interest.” (Section 87100.) Accordingly, the Act requires every public official to disclose all his or her economic interests that could foreseeably be affected by the exercise of the official’s duties. (Section 81002(c); and Sections 87200-87350.) This disclosure is accomplished by filing a Form 700, Statement of Economic Interest.

Public officials who are required to file statements of economic interests are either identified in Section 87200 (statutory filers) or designated in an agency’s conflict of interest code (designated employees or code filers). (Sections 87300 and 87302.) “Public officials” and “designated employees” include “every member, officer, employee or *consultant* of a state or local government agency.” (Sections 82019 and 82048; emphasis added) CalPERS attorneys (all levels) are designated as a disclosure category 1 position in the agency’s Conflict of Interest Code. (See <https://www.calpers.ca.gov/docs/conflict-of-interest-code.pdf>.)

The issue here is whether Mr. Shah, as contracted legal counsel to CalPERS, is a “consultant” under the terms of the Act. Regulation 18700.3(a)(2) defines a “consultant” to include an individual who, pursuant to a contract with an agency, does the following:

Serves in a staff capacity with the agency and in that capacity participates in making a governmental decision as defined in Regulation 18704(a) and (b) or performs the same or substantially all the same duties for the agency that would otherwise be performed by an individual holding a position specified in the agency’s Conflict of Interest Code under Section 87302.

Mr. Shah meets the definition under Regulation 18700.3(a)(2), in that he is (a) serving in a staff capacity and (b) in that capacity participates in making governmental decisions. Additionally, Mr. Shah meets the alternate definition of “consultant” in Regulation 18700.3(a)(2). He is performing the same duties for CalPERS that would otherwise be performed by staff counsel, a position designated in the agency’s Conflict of Interest Code.

Staff capacity: The Commission has construed the phrase “serves in a staff capacity” in Regulation 18700.3(a)(2) to include individuals who are performing substantially all the same tasks that normally would be performed by one or more staff members of a governmental agency. Implicit in the notion of service in a staff capacity is an ongoing relationship between the contractor and the public agency. We have previously found that a contractor serves in a staff capacity when the contract calls for work to be performed “over more than one year” on “high level” projects (*Ennis* Advice Letter, supra, No. A-15-006; see also *Ferber* Advice Letter, No. A-98-118). We have further advised that a contractor does *not* act in a staff capacity where the work is to be performed on one project or a limited number of projects over a limited period of time (*Sanchez* Advice Letter, No. A-97-438); where the relationship between the contractor and the agency would last only 12 - 16 months with no ongoing relationship contemplated (*Harris* Advice Letter, No. A-02-239); and where, under a multi-year contract, the contractor would perform only on a sporadic basis. (*Maze* Advice Letter, No. 1-95-296; *Parry* Advice Letter, No. 1-95-064.)

Here, Mr. Shah, has already worked for a year in his capacity as contract legal counsel, and will apparently continue to do so. The facts indicate he is performing the tasks that staff counsel would perform, but for the concern regarding improper ex parte communications with the Board. This work is of a “high level” in that Mr. Shah communicates directly and exclusively with the Board on matters concerning proposed administrative decisions received from the OAH. Mr. Shah is paid on an hourly rate, has billed in excess of \$113,900 for the past year, and does not have a “project” number or time limit.

In addition to serving in a staff capacity, a “consultant” must “participate in making a governmental decision.” “Making a decision” includes a public official’s authorization or direction of any action by an agency. (See Regulation 18704(a).) “Participating in a decision” occurs when the official “provides information, an opinion, or a recommendation for the purpose of affecting the decision without significant intervening substantive review.” (Regulation 18704(b).) “Significant intervening substantive review” has been interpreted to require more than the mere review of the recommendations by superiors, but rather the independent checking of the results without solely relying on the data of the official. (*Greenwald* Advice Letter, No. 1-90-349.)

Mr. Shah advises the Board regarding petitions for reconsideration of OAH decisions. In this capacity, he is directly advising the Board to take action, with no involvement by CalPERS staff or Legal Office. Mr. Shah meets the second component to the initial definition of consultant under Regulation 18700.3(2).

Additionally, Mr. Shah meets the latter definition of “consultant” under Regulation 18700.3(a)(2). Mr. Shah, as legal counsel, is performing the same duties for CalPERS that would otherwise be performed by staff counsel, a position specified in the agency’s Conflict of Interest Code under Section 87302. (Regulation 18700.3(a)(2).) (See <https://www.calpers.ca.gov/docs/conflict-of-interest-code.pdf>.)

Accordingly, we find that Mr. Shah is a consultant to CalPERS; and therefore a public official subject to the Act’s disclosure and disqualification provisions.

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

Sincerely,

Hyla P. Wagner
General Counsel

A handwritten signature in black ink, appearing to read "L. Karen Harrison". The signature is fluid and cursive, with a large initial "L" and "K".

By: L. Karen Harrison
Counsel, Legal Division

LKH:jgl