



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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September 1, 2017

Betsy Martyn
City Attorney
City of Canyon Lake
13 Via Palmira
Palm Desert, CA 92260

Re: Your Request for Informal Assistance
Our File No. I-17-212

Dear Ms. Martyn:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the "Act").¹ Since you are not asking on behalf of the official in question but in your capacity as counsel for the Big Bear Airport District, we can only provide informal assistance. Please note:

1. Informal assistance does not provide the requester with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)
2. 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. We also do not provide advice on other Government Code sections not in the Act or local policies.
3. We are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

QUESTION

May a Board Member facing Board censure participate in decisions of their Board as to whether or not the agency should provide and/or fund the defense of the Board Member?

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

Since the District is not obligated to provide the defense and indemnification of the Board Member under Section 995, the exception set forth in Regulation 18704(d)(3) does not apply and the Board Member would be prohibited from making, participating in making, or influence the decisions in his official capacity.

FACTS

At its August 2017, regular board meeting, the Board of Directors voted to place on the October 2017 agenda the censure of one of their Board members for various reasons related to his conduct toward other current and former Board members. Your District's Directors' Policy Manual provides that

“As set out in applicable law, the District shall defend and indemnify Board members from any claim liability or demand that arises out of a Directors' performance of his/her duties as a Board member or officer of the District within the requirements of State law.”

You stated that you believe under your policy that the duty is not triggered by censure, which is a non-litigation, non-disciplinary but political act of criticism and disapproval. (See Section 995 et seq.)

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 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 interests. (Section 87103.)

In addition to the other interests set forth in Section 87103, a public official always has an interest in his or her personal finances. And while the decision to censure may not have a financial effect on the official's personal finances, as you noted in your correspondence dated August 30, 2017, the decision to provide free legal services would affect the official's personal finances.

Foreseeability and Materiality

The standard for determining foreseeability is set forth in Regulation 18701, and depends upon whether the financial interest is "explicitly involved" in the government decision. Your facts indicate the board member is explicitly involved in the decision in question. Therefore, the effect is deemed reasonably foreseeable.

Regulation 18702.5(a) provides:

“A personal financial effect means the financial effect of a governmental decision on the personal finances of a public official or his or her immediate

family. The financial effect is material if the official or the official's immediate family member will receive a measurable financial benefit or loss from the decision.”²

The provision of legal services free of charge to the official, or paying for the official to get legal services that he would otherwise have to pay for would constitute a measurable financial effect on the official’s personal finances. Thus, absent an exception, the Board Member would have a conflict of interest. Since he would have a conflict of interest, Regulation 18704 specifies he is prohibited from doing any of the following:

“(a) Making a Decision. A public official makes a governmental decision if the official authorizes or directs any action, votes, 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.

“(b) Participating in a Decision. A public official participates in a governmental decision if the official provides information, an opinion, or a recommendation for the purpose of affecting the decision without significant intervening substantive review.

“(c) Using Official Position to Attempt to Influence a Decision. A public official uses his or her official position to influence a governmental decision if he or she:

“(1) Contacts or appears before any official in his or her agency or in an agency subject to the authority or budgetary control of his or her agency for the purpose of affecting a decision; or

“(2) Contacts or appears before any official in any other government agency for the purpose of affecting a decision, and the public official acts or purports to act within his or her authority or on behalf of his or her agency in making the contact.”

However, Regulation 18704(d) also provides the following pertinent exceptions.

- An appearance by a public official as a member of the general public before an agency in the course of its prescribed governmental function if the official is appearing on matters related solely to the his or her personal interests is not prohibited. (Regulation 18704(d)(2).)

Thus, the Board Member may speak as a member of the audience in the same manner as any other member of the public to advocate his own personal interests.

- Actions by a public official relating to his or her compensation or the terms or conditions of his or her employment or consulting contract. (Regulation 18704(d)(3).) However, an

² Note in January 2015, the Commission removed the \$250 and replaced it with the current standard of “measurable financial benefit or loss” which is determined on a case-by-case basis.

official may not make a decision to appoint, hire, fire, promote, demote, or suspend without pay or take disciplinary action with financial sanction against the official or his or her immediate family, or set a salary for the official or his or her immediate family different from salaries paid to other employees of the government agency in the same job classification or position. (*Ibid.*)

With respect to this exception we have advised that it applies as follows:

“[A] public official may make, participate in making, and influence a governmental decision about whether he or she will be provided with a defense or indemnification for damages *where the agency is obligated to provide the defense and indemnification if the public official was acting within the scope of his or her employment. Where such defense and indemnification are obligatory if the public official was acting within the scope of his or employment, we will consider the payments to be in the nature of a term or condition of employment. [Emphasis added.]*

“Thus, as a general rule, a public official like Supervisor Oken will be able to take part in decisions about whether he will be provided a defense and indemnification for general damages claims, because his agency is obligated to provide such if he was acting in the scope of his employment. (See Section 825(a).)” (*Cronin Advice Letter, No. A-97-579.*)

You noted that your District’s policy is based on the Government Code and does not expand or contract the scope of the relevant sections. Section 995 establishes *a duty* to provide for a defense *in any civil action or proceeding* brought against a member in his or her official or individual capacity or both, if the action is based on an act or omission within the scope of the official’s employment as an employee of the public entity. The action in question is not a civil action or proceeding.

Since the District is not obligated to provide the defense and indemnification of the Board Member under Section 995, the exception set forth in Regulation 18704(d)(3) does not apply and the Board Member would be prohibited from making, participating in making, or influence the decisions.

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

Sincerely,

Jack Woodside
General Counsel

By: 
Assistant General Counsel, Legal Division

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