

Memorandum

To : Honorable Brad Sherman
Board Member, Second District

Date: June 29, 1993

From : E. L. Sorensen, Jr.
Chief Counsel

Subject: **Contribution Disclosure Opinion 93-7**

- 1) The ability of the Board to decide a case when contribution disclosure statements have not been filed.
- 2) The use of random selection to form a quorum.

During the Board meeting in Torrance on June 7, 1993, you asked for an opinion recommending various ways to move cases forward to a decision when contribution disclosure statements have not been filed. Your request raised two separate issues. First, may the Board decide a case when contribution disclosure statements have not been filed by the parties, participants or agents involved in the case? Second, when is it appropriate for the Board to form a quorum by random selection of a disqualified Member or Members, and what method may be used to accomplish the random selection? Both of these issues will be addressed below.

Question 1:

May the Board decide a case when contribution disclosure statements have not been filed by the parties, participants or agents involved in the case?

Answer:

After a reasonable investigation by the Board Members of their campaign records, those Members who have discovered no disqualifying contributions may proceed to decide the case.

Analysis:

Government Code section 15626(c) provides that a Board Member shall not participate in making a decision if the Member "knows or has reason to know" that he or she received a contribution or contributions in an aggregate amount of two hundred fifty dollars (\$250) from a party, participate or agent to an adjudicatory proceeding pending before the Board. Section 15626(h)(6) explains the phrase "knows or has reason to know" as follows:

A member knows or has reason to know about a contribution if, after the adjudicatory proceeding first appears on a meeting notice of the board, facts have been brought to the member's personal attention that he or she has received a contribution which would require disqualification under subdivision (c), or that the member received written notice from the board staff, before commencement of the hearing and before any subsequent decision on the matter, that a specific party, close corporation, or majority shareholder, or agent thereof, or any participant having a financial interest in the matter, or agent thereof, in a specific, named adjudicatory proceeding before the board, made a contribution or contributions within the preceding 12 months in an aggregate amount of two hundred fifty dollars (\$250) or more. (Emphasis added.)

Section 15626(h)(6) provides further that:

The notice of contribution shall be on a form prescribed under rules adopted by the board to provide for staff inquiry of each party, participant, close corporation, and its majority shareholder, and any agent thereof, to determine whether any contribution has been made to a member, and if so, in what aggregate amount and on what date or dates within the 12 months preceding an adjudicatory proceeding or decision."

In addition, the staff shall inquire and report on the record as follows:

(A) Whether any party or participant is a close corporation, and if so, the name of its majority shareholder.

(B) Whether any agent is an employee or member of any law, accounting, consulting or other firm, or similar entity or corporation, and if so, its name and address and whether a contribution has been made by any such person, firm, corporation, or entity.

Section 15626 does not require that contribution disclosure statements be filed prior to a decision by the Board. (See Contribution Disclosure Opinion (CDO) 92-1 and 92-9.) Although "notice of contribution" received through the staff must be on a prescribed form, section 15626(h)(6) also provides for knowledge of a contribution based on "facts [that] have been brought to the member's personal attention." Further, the inquiry and report

required by section 15626(h)(6)(A)&(B) does not have to be made on the contribution disclosure statements. If the failure to file contribution disclosure statements has made it necessary, this inquiry may be made orally and then placed on the record. Therefore, once the staff has made the inquiry and report required by section 15626(h)(6)(A)&(B), those Members who neither know nor have reason to know of any disqualifying contributions may proceed to decide the case.

To satisfy the requirement that the Board Member neither know nor have reason to know of a disqualifying contribution, a Board Member may conduct a reasonable investigation of his or her campaign statements and any campaign contributions that have not yet been reported on the statements. If the Board Member is satisfied that there has been no disqualifying contribution, both the letter and the intent of the law have been satisfied, and the Member may participate in the decision. We advise that the Member place on the record that an investigation of his or her campaign records has been conducted, and that he or she is not aware of any disqualifying contribution and therefore is qualified to participate in deciding the matter.

Question 2:

When is it appropriate for the Board to form a quorum by random selection of a disqualified Member or Members, and what method may be used to accomplish the random selection?

Answer:

When the existence of a disqualifying contribution or contributions, leave the Board with insufficient Members to form a quorum, and there exists no alternative source of decision, the Board Members should, by lot or some other random form of selection, determine which Member or Members should be brought back to form a quorum.

Analysis:

Section 15626(i)(5) provides in pertinent part that:

This section shall not prevent any member of the board from making, or participating in making, a governmental decision to the extent that the member's participation is legally required for the action or decision to be made.

As we stated in CDO 91-5, section 15626(i)(5) is essentially the same as Government Code section 87101, a part of the conflict of interest provisions of the Political Reform Act (Government Code sections 81000-91015); therefore, the Fair Political Practices Commission's (FPPC) interpretation of section 87101 provides guidance in this area.

2 Cal. Code of Regulations, section 18701(a), which interprets section 87101, states that "[a] public official is not legally required to make or to participate in the making of a governmental decision within the meaning of Government Code Section 87101 unless there exists no alternative source of decision consistent with the purpose and terms of the statute authorizing the decision." Since section 15626 is essentially the same as section 87101, we advise that prior to finding that a Board Member's participation is legally required, a determination should be made that there is no alternative source of decision consistent with the purpose and terms of the statute authorizing the decision. This determination should be made by the Chief Counsel, or in the Chief Counsel's absence, by the Assistant Chief Counsel present at the Board Hearing. At the request of the Chairman, the Chief Counsel or Assistant Chief Counsel will determine on the record that there is no alternative source of decision.

As we advised when we followed In re Hudson (1978) 4 FPPC Ops. 13. in CDO 91-5, "the board may bring back as many disqualified members as is necessary to establish a quorum. The preferred means of selecting which disqualified member should participate is by lot or other means of random selection. However, nothing in the [Political Reform] Act prevents the use of other impartial and equitable means of selection." Consistent with this FPPC opinion, section 7008(d) of the proposed contribution disclosure regulations provides that:

In the event a board member's participation is legally required for the action or decision to be made, the board may bring back as many disqualified members as is necessary to establish a quorum. The preferred means of selecting which disqualified member should participate is by lot. Other means of random selection or other impartial and equitable means of selection may also be used.

Since any random method of selection is acceptable, we recommend the commonly used and simple method of drawing names from a container. This can quickly and easily be accomplished by providing Mrs. Janice Masterton with a supply of business cards

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for each Board Member. In the event that there are insufficient Board Members to form a quorum, and the determination is made that there is no alternative source of decision, Mrs. Masterton would place the business cards of the disqualified Members into a container. Another staff member (again, we recommend the Chief Counsel or if the Chief Counsel is not present the Assistant Chief Counsel present at the Board Hearing) would then draw out as many names as needed to form the quorum.

Finally, based on regulation 18701 and FPPC advice letters, the randomly selected member may fully participate at public meetings and at any closed sessions required by law. (See Schectman Advice Letter, No. 92-198, Freeman Advice Letter No. 90-525.)

A handwritten signature in cursive script, appearing to read "E. L. Fong".

ELS:ph

cc: Honorable Ernest J. Dronenburg, Jr.
Honorable Matthew K. Fong
Honorable Gray Davis
Member First District
Contribution Disclosure Binder Distribution List