

March 13, 1992

Judith M. Richards
President/General Manager
4185 Home Avenue
San Diego, CA 92105
Dear Ms. Richards:

Alan Ziegaus

In a letter dated March 3, 1992, you expressed concern about the appearance of conflict created by Mr. Alan Ziegaus serving both as a Civil Service Commissioner and as campaign advisor to City Attorney John W. Witt. You have requested our opinion on the perceived conflict.

Pursuant to the Political Reform Act (Government Code Section 81000 et seq.), the Fair Political Practices Commission has adopted regulations which amplify potential conflicts of interest. Title 2, Division 6 of the California Code of Regulations Section 18702.1 specifically addresses the issue of "Material Financial Effect: Official's Economic Interest is Directly Involved in the Decision." The regulation states in pertinent part:

- (a) The effect of a decision is material if any of the following applies:
 - (1) Source of Income or Gifts - Any person in this case Mr. Witt (including a business entity) which has been a source of income (including gifts) to the official Commissioner Ziegaus of \$250 or more in the preceding 12 months is "directly involved in a decision before the official's agency" or there is a nexus (as defined in subdivision (d)) between the purpose for which the official receives income and the governmental decision. (Emphasis added.)

By retaining Commissioner Ziegaus as his campaign advisor, Mr. Witt has become a source of income for Commissioner Ziegaus as defined by the regulation. Simply being a source of income, however, is insufficient relatedness under the regulation to create a conflict. There must also be either direct involvement or a nexus between the source of income and its effect on the decisions Commissioner Ziegaus makes in his official capacity. Pursuant to the regulation, a person is "directly involved" in a decision under the following circumstances:

(b) A person or business entity is "directly involved in a decision before an official's agency" when that person or entity, either personally 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.
- (3) A person or business entity 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 or business entity.

In appeals before the Commission, City Attorney Witt is not a named party nor the subject of the proceeding and does not, except in rare instances, initiate the proceedings. Therefore, he does not fit within any of the three above mentioned categories. He is merely an agent of the appointing authority, representing the appointing authority in the appeal. Deputy City Attorneys who either advise the Civil Service Commission or the appointing authority act as an agent of Mr. Witt. As a result, the direct involvement considered in the regulation is even further removed. In those instances, when a request for an action by the Commission would directly affect the City Attorney's office, for example a special merit salary increase for a classified employee of the Attorney's office, on balance it might be appropriate for Commissioner Ziegaus to recuse himself from voting on the issue. In all other cases, the business relationship between Mr. Witt and Commissioner Ziegaus does not result in a conflict as defined by the regulations.

I have attached a Memorandum of Law dated April 26, 1988, which addresses the conflict of interest issue. As noted at page 4 of the memorandum, the direct involvement provisions appear to:

Recognize specifically that lawyers or architectural firms may from time to time appear before public officials on behalf of

others. The appearance of those firms, even if they have some tie to a public official, does not automatically render a public official unable to participate in or vote on a particular governmental decision.

Therefore, under the guidelines of the Fair Political Practices Act, no conflict of interest is created by Commissioner Ziegaus continuing to act both in his official capacity as a commissioner and as campaign advisor to City Attorney John Witt.

The other manner in which a conflict may be found pursuant to the regulations is when a nexus exists between the purpose for which the official receives income and the governmental decision. The regulations indicate there is a nexus if the official receives income to achieve a goal or purpose which would be achieved, defeated, aided or hindered by the decision. Although it would appear that Commissioner Ziegaus' decision in a civil service appeal could have no possible effect on the outcome of the upcoming election, it is probably best to consider each case individually. Commissioner Ziegaus may then recuse himself if it is determined that a particular appeal may affect the election.

Council Policy 000-04, Code of Ethics, also addresses the conflict of interest issue. As with the Fair Political Practices Act, the question that must be resolved is whether Commissioner Ziegaus' involvement with Mr. Witt's campaign will impair his judgement or affect his decisions as a commissioner. Your letter indicates your concern is that Commissioner Ziegaus will subconsciously favor the representation by the City Attorney's office in cases before him. Again, it is important to note the City Attorney's office has no stake in the cases they represent. This office acts merely as an agent for the appointing authority in cases before the Commission. It is difficult to conceive of Commissioner Ziegaus ignoring the underlying facts of a case simply because this office acts as advisor to the appointing authority. In those instances, when the City Attorney's office is directly involved in a case, it is now, and has been our opinion in the past, that independent counsel is necessary and appropriate.

In spite of the lack of a legally defined conflict of interest, your concerns about the appearance of conflict are understood by both this office and Commissioner Ziegaus. If you are not persuaded that Commissioner Ziegaus can, and will, act in a fair and impartial manner during the course of the campaign, it would be appropriate to request that Commissioner Ziegaus recuse himself from hearing any appeals or participating in monthly meetings until the election is over. Commissioner Ziegaus has indicated a willingness to take such action should it be necessary to avoid any appearance of impropriety.

It is hoped that this letter will allay your concerns. If it does not, or if I can be of further assistance, please feel free to contact me.

Sincerely yours,
JOHN W. WITT, City

Attorney

By
Sharon A.

Marshall

Deputy City

Attorney

SAM:mrh:360.1

Attachment

MS-92-1

cc Hope Logan

Richard Snapper

Stan Robinson, Local 127

Ron Saathoff, Local 145

Harry Eastus, Police Officers' Association