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MAIL DATE
10/11/96

Decision 96-10-041 October 9, 1996

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Resolution M-4781. Executive Resolution)
Addressing a Protest by Fund for the)
Environment of Actions By the Department)
of Health Services Under the Commission's)
Direction in Decision D.93-11-013.)

ORIGINAL

Application No. 96-06-010
(Filed June 4, 1996)

ORDER DENYING REHEARING OF RESOLUTION M-4781

I. Introduction:

On June 4, 1996, Fund for the Environment (Fund) filed an application for reconsideration of Resolution M-4781.¹ In Resolution M-4781, we found no conflicts of interest in the Commission's study of policy options for public schools regarding electric and magnetic fields (EMFs). The study, which is part of the EMF research program established by D.93-11-013, is being conducted, in part, by EcoAnalysis, Inc., Asher R. Sheppard, and Scott Strauss. At the time the contract was awarded, each was currently working or had worked previously as a consultant for private entities affected by the outcome of the study. On June 17, 1996, the California Department of Health Services (DHS), which was chosen by the Commission to manage the EMF program, filed a response to the application. In its application, Fund argues that Resolution M-4781 was based on legal error because: 1) it failed to find a conflict of interest under the state Political Reform Act (PRA); 2) it failed to find a legally significant appearance of

¹ Because Fund is arguing that Resolution M-4781 is based on legal error, its request is being treated as an Application for Rehearing pursuant to Rule 85 et seq., and is docketed as App. No. 96-06-010.

impropriety; and 3) it did not consider possible conflicts of interest under state public contracting law. We have considered all the allegations of error in the application and are of the opinion that good cause for rehearing has not been shown. Therefore, we are denying Fund's application.²

II. Discussion:

1. The PRA Does Not Apply to EcoAnalysis, Sheppard, and Strauss Because They Are Not Involved in Governmental Decision Making as Required By Government Code Section 87100

Fund contends that the Resolution errs in finding no violation of the PRA, which provides in part that no public official shall participate in making a government decision in which he knows or has reason to know he has a financial interest. (Gov't Code Section 87100.) However, Fund's argument fails for a number of reasons.

First, to be treated as "public officials" under Gov't Code Section 87100, consultants hired by public agencies must be engaged in governmental decision making. (FPPC Reg. 18700(a)(2)(A).) FPPC regulations define governmental decision making as: 1) approving a rate, rule, or regulation; 2) adopting or enforcing a law; 3) issuing or denying a permit; 4) authorizing the agency to enter into a contract; 5) granting agency approval to a contract; 6) granting agency approval to a plan, design, report, or similar item; or 7) adopting policies or standards for the agency. (FPPC Reg. 18700(a)(2)(A).) In contrast, EcoAnalysis, Sheppard, and Strauss have been hired only to identify and evaluate a series of policy options for decision-

² Fund also argues that the Commission should modify Resolution M-4781 to ensure that future contracts awarded under the EMF program are in compliance with state conflict laws. However, because Fund has not shown legal error with respect to any current EMF contracts, there is no need to modify the Resolution.

makers to consider. (See School Policy Study RFP, pp. 3-6.) They have no authority to commit a public agency to a particular course of action or position, as required by the FPPC regulations. Therefore, Gov't Code Section 87100 does not apply.

Fund further contends that EcoAnalysis, Sheppard, and Strauss are covered by FPPC Reg. 18700(c)(2)(A), which provides in part that a public official "participates in making a governmental decision" when she "[a]dvises or makes recommendations to the decision maker ... by conducting research or making any investigation which requires the exercise of judgment ... and the purpose of which is to influence a [specified type of] governmental decision." However, for reasons already discussed above, EcoAnalysis, Sheppard, and Strauss are not public officials within the meaning of the PRA. Therefore, FPPC Reg. 18700(c)(2)(A) does not apply.

2. There Is No Legally Significant Appearance of Impropriety Under the PRA Because The PRA Does Not Apply to EcoAnalysis, Sheppard, and Strauss

Fund contends that while discussing Resolution M-4781, the Commission asked about the legal significance of appearances of impropriety under state law and was erroneously told by counsel that there is no statutory or decisional law on point. Fund urges us to consider Witt v. Morrow (1977) 70 Cal. App.3d 817, 822-23, among other authorities, which interprets the PRA to prohibit "not just actual improprieties ... but also the appearance of possible improprieties."

Fund is correct about the scope of Gov't Code Section 87100, but its argument fails nonetheless because appearances of impropriety are only legally significant if the PRA applies in the first place. Because EcoAnalysis, Sheppard, and Strauss are not "public officials"

or "consultants" engaged in governmental decision making, it does not.

3. Public Contracting Law Does Not Void the Contract at Issue Because EcoAnalysis, Sheppard, and Strauss Did Not Participate in Making the Contract as Required by Government Code Section 1090

Finally, Fund contends that the Resolution errs in failing to consider the entire scope of applicable conflict-of-interest law. In particular, it urges the Commission to consider Gov't Code Section 1090, the main statutory provision governing public contracting.

Section 1090 provides in part that public officers and employees "shall not be financially interested in any contract made by them in their official capacity." "The critical test for determining whether Section 1090 has been violated is whether an officer or employee has *participated in the making of a contract* in his or her official capacity." (Millbrae Assn For Residential Survival v. City of Millbrae (1968) 262 Cal. App.2d 222, 237) (emphasis added.)

The "making of a contract" has been interpreted liberally by the courts, so that it includes preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitations for bids. (Millbrae Assn., *supra*, at 237.) However, EcoAnalysis, Sheppard, and Strauss had no hand whatsoever in the decision to award the contract for the school policy study. Therefore, Section 1090 does not apply on its face.

Fund relies on 46 Ops. Cal. Att. Gen 74 (1965), which concludes that private consultants hired on a temporary basis by public agencies may owe the same duty of loyalty and allegiance to the public interest as permanent public officials and employees. However, this does not affect the more basic problem with Fund's argument. EcoAnalysis, Sheppard, and Strauss

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did not participate in making any public contract. They each stand to gain financially, but only as the recipients of a contract awarded through a request for proposal process designed and administered by DHS

No further discussion is required of Applicant's allegations of error. Accordingly, upon reviewing each and every allegation of error raised by Applicant we conclude that sufficient grounds for rehearing of Resolution M-4781 have not been shown.

Therefore, **IT IS ORDERED:**

That the application for rehearing of Resolution M-4781 filed by Fund for the Environment is denied.

This order is effective today.

Dated October 9, 1996, at San Francisco, California..

P. GREGORY CONLON
President
DANIEL WM. FESSLER
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioners