

February 7, 2006

Michael L. Schneyder
Josephine County Assessor
Courthouse, 500 N.W. 6th Street
Grants Pass, Oregon 97526

Dear Mr. Schneyder:

This is in response to your correspondence dated January 17, 2006 regarding county commissioners acting as members of the Budget Committees and approving salary adjustments for elected officials of the county.

OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION
STAFF OPINION NO. 06S-002

STATED FACTS: A county has a budget committee that is formed under provisions of ORS Chapter 294 and guidelines provided in an Oregon Department of Revenue manual on local budgeting law.

The budget committee is comprised of the three county commissioners and three appointed citizens of the county. The passage of any budget issue before the committee requires four affirmative votes.

The budget committee approves the level of compensation for elected officials in the county. This means that the elected commissioners act on any changes to their own compensation, both as members of the budget committee and later when approving the final budget as the board of commissioners.

RELEVANT STATUTES: The following Oregon Revised Statutes (ORS) are applicable to the issues that are addressed in this opinion:

244.020(1) " 'Actual conflict of interest' means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which would be to the private pecuniary benefit or detriment of the person or the person's relative or any business with which the person or a relative of the person is associated unless the pecuniary benefit or detriment arises out of circumstances described in subsection (14) of this section."

244.020(14) " 'Potential conflict of interest' means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which could be to the private pecuniary benefit or detriment of the person or the person's relative, or a business with which the person or the person's relative is associated, unless the pecuniary benefit or detriment arises out of the following:"

244.020(15) " 'Public official' means any person who, when an alleged violation of this chapter occurs, is serving the State of Oregon or any of its political subdivisions or any other public body of the state as an officer, employee, agent or otherwise, and irrespective of whether the person is compensated for such services."

244.040 "**Code of ethics; prohibited actions; honoraria.** The following actions are prohibited regardless of whether actual conflicts of interest or potential conflicts of interest are announced or disclosed pursuant to ORS 244.120:"

244.040(1)(a) "No public official shall use or attempt to use official position or office to obtain financial gain or avoidance of financial detriment that would not otherwise be available but for the public official's holding of the official position or office, other than official salary, honoraria, except as prohibited in paragraphs (b) and (c) of this subsection, reimbursement of expenses or an unsolicited award for professional achievement for the public official or the public official's relative, or for any business with which the public official or a relative of the public official is associated."

244.120 "**Methods of handling conflicts; generally; application to elected officials or members of boards.** (1) Except as provided in subsection (2) of this section, when met with an actual or potential conflict of interest, a public official shall:"

244.120(2) "An elected public official, other than a member of the Legislative Assembly, or an appointed public official serving on a board or commission, shall:"

244.120(2)(b) "When met with an actual conflict of interest, announce publicly the nature of the actual conflict and:"

244.120(2)(b)(A) "Except as provided in subparagraph (B) of this paragraph, refrain from participating as a public official in any discussion or debate on the issue out of which the actual conflict arises or from voting on the issue."

QUESTION: Would a county commissioner violate Government Standards and Practices law by participating, both as a member of the budget committee and later as a member of the board of commissioners, in discussions on and passage of the county's budget when it may impact the commissioner's official salary?

OPINION: Government Standards and Practices law has two provisions that could apply. One prohibits public officials from using or attempting to use an official position to accept a financial gain that would not otherwise be available but for holding the public position. One of four exceptions is official salary. It appears that if county commissioners participate on actions regarding their own compensation, it would not constitute using an official position to receive a prohibited financial gain.

The second provision that could apply provides that a public official is met with a conflict of interest when participating in any action or any decision or recommendation in which there would be an impact on the public official's personal financial interests [see ORS 244.020(1)]. When public officials are met with this actual conflict of interest, they must disclose the nature of the conflict and refrain from further participation in action on the issue [see ORS 244.120(2)(b) and ORS 244.120(2)(b)(A)].

With regard to the county commissioners voting on issues related to their own official salary, the perception is that the county commissioners would be met with an actual conflict of interest. This would require each county commissioner to publicly disclose the nature of the conflict of interest and refrain from further participation.

It does not appear that the circumstances presented in the stated facts were anticipated when the language of the relevant statutes was written and adopted. One county commissioner must vote to refer the proposed budget to the board of commissioners and then a majority of commissioners must vote to approve the budget. The board of commissioners for the county is the only lawful authority to approve the expenditure of the county's public funds. Accordingly, the procedures prescribed in ORS 244.120 for disclosure and not participating in the discussion and passage of the county budget would not appear to be practicable, since every county commissioner would be met with an actual conflict of interest.

The Oregon Supreme Court issued an opinion in the matter of Oregon State Police Officers Association v. State of Oregon. 323 OR 356 (1996). This case was a challenge to a ballot initiative passed by the Oregon voters in 1994 which required public employees to pick up the 6% contribution to the Public Employees Retirement System (PERS). In that opinion, the court acknowledged that its own members were also public employees and members of PERS. The

court noted that each justice would be financially impacted by the outcome of the litigation at hand. The court further stated that because there was no alternative tribunal to make the ruling they were about to render, a "rule of necessity" authorized the justices to decide the issues.

It appears that such a "rule of necessity" would apply in answers to the questions raised in this opinion request. According to the stated facts, the county commissioners are required to participate in the county budget committee and at least one must vote for the budget to be referred to the board of commissioners. The board of commissioners has sole authority to approve the budget and any subsequent expenditure of the county's public money. While the individual county commissioners would be financially impacted by the outcome of official action, the "rule of necessity" would be applicable in these circumstances.

THIS RESPONSE ADDRESSES ONLY THE APPLICATION OF ORS 244 TO THE FACTS STATED HEREIN. ANY RELEVANT INFORMATION, WHICH WAS NOT INCLUDED BY THE REQUESTER OF THIS OPINION IN THE STATED FACTS, COULD COMPLETELY CHANGE THE OUTCOME OF THIS OPINION. OTHER LAWS OR REQUIREMENTS MAY ALSO APPLY. THIS IS NOT A FORMAL ADVISORY OPINION PURSUANT TO ORS CHAPTER 244.280. THIS OPINION DOES NOT EXEMPT A PUBLIC OFFICIAL FROM LIABILITY UNDER ORS CHAPTER 244 FOR ANY ACTION OR TRANSACTION CARRIED OUT IN ACCORDANCE WITH THIS OPINION. THIS OPINION IS ONLY MY PERSONAL ASSESSMENT AS THE EXECUTIVE DIRECTOR OF THE OREGON STANDARDS AND PRACTICES COMMISSION.

Please contact this office again if you would like this opinion submitted to the Government Standards and Practices Commission for adoption as a formal advisory opinion pursuant to ORS 244.280.

Sincerely,

L. Patrick Hearn
Executive Director