Theodore R. Kulongoski, Governor

January 16, 2004

Jeffrey J. Baker
Annala, Carey, Baker & Thompson, P.C.
P.O. Box 325
Hood River, Oregon 97031

Dear Mr. Baker:

This is in response to your correspondence dated December 12, 2003. You outlined concerns expressed by members of a school board regarding conflicts of interest and the provisions for an exception to public officials identified by the Government Standards and Practices Commission (GSPC) as members of a "class".

**OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION STAFF OPINION NO. 04S-001**

STATED FACTS: A school district has a board of directors with seven elected positions. The members of the board select a chair and vice chair. The chair presides over meetings of the board members held approximately twice a month. The board has the usual and customary powers of other such Oregon entities.

The school district has two bargaining units representing two categories of employees. One represents 256 certified employees and the other represents 221 classified employees.

Currently, two board members have spouses who are district employees. One board member is married to a certified employee and another board member is married to a classified employee.

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(14)(b) "Any action in the person's official capacity which would affect to the same degree a class consisting of all inhabitants of the state, or a smaller class consisting of an industry, occupation or other group including one of which or in which the person, or the person's relative or business with which the person or the person's relative is associated, is a member or is engaged. The commission may by rule limit the minimum size of or otherwise establish criteria for or identify the smaller class that qualify under this exception."

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."

244.020(16) " 'Relative' means the spouse of the public official, any children of the public official or of the public official's spouse, and brothers, sisters or parents of the public official or of the public official's spouse."

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)(a) "When met with a potential conflict of interest, announce publicly the nature of the potential conflict prior to taking any action thereon in the capacity of a public official; or"

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."

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."

QUESTION NO. 1: When the district school board is required to take official action regarding negotiations or approval of contracts between the district and either of the bargaining units, do the board members with spouses in the bargaining units have a "class exemption" from the requirement to publicly announce the nature of a conflict of interest?

OPINION: Yes. Oregon Government Standards and Practices laws define actual and potential conflicts of interest [(ORS 244.020(1) and ORS 244.020(14)]. Public officials are met with potential or actual conflicts of interest when required to participate in official action that could or would have a financial impact on that official or a relative of that official.

ORS 244.020(14)(b) enables the GSPC to determine if the anticipated official action by a public official would affect members of a group to the same degree. If the financial impact would be the same for all members of the group, that group would be identified as a "class."

Ordinarily, if a board member were required to participate in action that would have a financial impact on a spouse, the board member would be met with a conflict of interest. The stated facts of this request indicate that the spouses of the board members belong to collective bargaining units. Collective bargaining contracts affect all members of the collective bargaining unit to the same degree. In the past, the GSPC has taken the position that members of bargaining units are members of a group, the members of which are each impacted to the same degree. Accordingly, the board members would be exempt from the requirements to publicly declare conflicts of interest when participating in official actions on the district's negotiations and agreements with the employee bargaining units.

QUESTION NO. 2: Would the "class exception" continue to apply for official actions the board members participate in on issues that would have a direct financial impact on their spouses individually or if the impact was upon the spouse as a member of a smaller group of employees within a bargaining unit?

OPINION: ORS 244.020(14)(b) enables the GSPC to determine if a public official is a member of a group for which the "class exception" would apply. The answer to questions, such as the one posed, cannot be answered with certainty until the specific facts and circumstances are known.

If the anticipated official action were to reduce the number of full time certified positions in the district's kindergarten program and a board member's spouse held one of the certified positions, a "class exception" could apply. For example, if the issue to be acted upon was whether the number of FTE's should be reduced, a "class exception" would apply. If, on the other hand, the issue were which of the ten FTE's would be eliminated, the board member would be met with an actual conflict of interest. The law would require the board member to publicly disclose the conflict and would prohibit the board member from participating in any official action related to the issue.

Another issue that might arise, from the stated facts, could be the board considering whether to reduce the hours worked by a group of district classified employees. For example, the board might consider a reduction in the hours worked by district custodians. If the spouse of a board member were employed as a custodian, the same application of ORS Chapter 244 would apply as that just presented regarding the certified employee issues.

**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

LPH/dc 04S-001