



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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March 12, 2024

Richard D. Pio Roda
District Counsel
Meyers Nave
1999 Harrison Street, 9th Floor
Oakland, California 94612

Re: Your Request for Advice
Our File No. A-24-019

Dear Mr. Pio Roda:

This letter responds to your request for advice regarding Government Code Section 1090, et seq.¹ Please note that we are only providing advice under Section 1090, not under other general conflict of interest prohibitions such as common law conflict of interest, including Public Contract Code.

Also, note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

We are required to forward your request regarding Section 1090 and all pertinent facts relating to the request to the Attorney General's Office and the Contra Costa County District Attorney's Office, which we have done. (Section 1097.1(c)(3).) We did not receive a written response from either entity. (Section 1097.1(c)(4).) We are also required to advise you that, for purposes of Section 1090, the following advice "is not admissible in a criminal proceeding against any individual other than the requestor." (See Section 1097.1(c)(5).)

QUESTION

Under the Act and Section 1090, may uncompensated Rodeo Hercules Fire Protection District Director Steve Hill take part in contracts between the District and his former employer, Contra Costa Fire Protection District ("Con Fire") (a county agency), given that he retired in 2023 and receives retirement benefits from the Contra Costa Employee Retirement Association, the county's retirement fund?

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18104 through 18998 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

CONCLUSION

Yes. Under the Act, Director Hill's retirement benefits and former salary and benefits related to his government employment do not constitute potentially disqualifying "income." Additionally, it is not reasonably foreseeable that the District's decisions would have a material effect on his personal finances because the decisions will not affect his retirement benefits. Because Director Hill is no longer employed by Con Fire and contracts between Con Fire and the District would have no effect on Director Hill's retirement benefits, he does not have a disqualifying interest in those contracts for purposes of Section 1090.²

FACTS AS PRESENTED BY REQUESTER

Steve Hill serves as a member of the Rodeo Hercules Fire Protection District ("District") Board of Directors, and his current term will expire in December 2026. Director Hill was employed by Contra Costa Fire Protection District ("Con Fire") as a Public Information Officer until he retired on July 31, 2023. Following his retirement, Director Hill receives monthly retirement payments of over \$500 from the Contra Costa Employee Retirement Association.

Director Hill does not receive any salary, per diem, or reimbursement for expenses in his capacity as a District Director. Further, there is no line item in the District's budget for any payments of any kind to the Directors.

The District is an independent fire protection district organized and operated pursuant to the Fire Protection District Law of 1987, Health and Safety Code Section 13800 *et seq.* The District provides fire protection services to an approximately 32 square mile service area that includes the City of Hercules and the unincorporated town of Rodeo in Western Contra Costa County. The District is governed by an elected five person board.

From time to time, the District works with Con Fire on specific discrete matters, as Con Fire's service area is contiguous with the District's boundaries and the two agencies work together through mutual aid and other similar arrangements. The District currently has ongoing contracts with Con Fire. The District expects these contracts may be amended or renegotiated in the future. It is likely other agreements will arise between Con Fire and the District during Director Hill's term.

In your request for advice, you also state there is "no potential" for a change in "salary, benefits, or status" as a result of a contract between the District and Con Fire because Director Hill is retired. You further explain, "the retirement payments come from Contra Costa County Employee Retirement Association, which is a body wholly independent and separate from Con Fire. Con Fire has no role or influence in the payment of or amount of the retirement benefit payment."

² We recommend that Director Hill seek further advice, as needed, in the event that a District contract would implicate his retirement benefits.

ANALYSIS

The Act

Under Section 87100 of the Act, “[a] public official at any level of state or local government shall not make, participate in making or in any way attempt to use the official’s position to influence a governmental decision in which the official knows or has reason to know the official has a financial interest.” “A public official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of the official’s immediate family,” or on certain specified economic interests. (Section 87103.) These economic interests include an official’s personal finances, as well as “[a]ny source of income . . . aggregating five hundred dollars (\$500) or more in value provided or promised to, received by, the public official within 12 months prior to the time when the decision is made.” (Section 87103(c).)

Director Hill does not receive any income in his capacity as a Director of the District. Director Hill receives monthly retirement payments of over \$500 from the Contra Costa Employee Retirement Association. However, under the Act, “income” does not include “[s]alary . . . social security, disability, or other similar benefit payments received from a state, local, or federal government agency” (Section 82030(b)(2).) As such, Director Hill’s retirement benefits do not constitute “income.” Likewise, his Con Fire salary and benefits received in the past 12 months prior to his retirement do not constitute “income” for purposes of the Act. Therefore, he does not have a source of income interest in District decisions involving Con Fire. However, the Act may still disqualify Director Hill from taking part in such decisions if they would have a reasonably foreseeable, material financial effect on his personal finances, as discussed below.

Regulation 18701(a) provides the applicable standard for determining the foreseeability of a financial effect on an economic interest explicitly involved in the governmental decision. It states, “[a] financial effect on a financial interest is presumed to be reasonably foreseeable if the financial interest is a named party in, or the subject of, a governmental decision before the official or the official’s agency.

Where, as here, an official’s economic interest is not explicitly involved in the governmental decision, the applicable standard for determining the foreseeability of a financial effect on the economic interest is found in Regulation 18701(b). That regulation provides, “[a] financial effect need not be likely to be considered reasonably foreseeable. In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official’s control, it is not reasonably foreseeable.”

A governmental decision’s reasonably foreseeable financial effect on a public official’s financial interest in their personal finances or those of immediate family, also referred to as a “personal financial effect,” is material if the decision may result in the official or the official’s immediate family member receiving a financial benefit or loss of \$500 or more in any 12-month period due to the decision. (Regulation 18702.5(a).) A personal financial effect is not material if the decision would affect only the salary, per diem, or reimbursement for expenses the public official or a member of their family receives from a federal, state, or local government agency unless the decision is to appoint, hire, fire, promote, demote, suspend without pay or otherwise take

disciplinary action with financial sanction against the official or a member of their immediate family, or to set a salary for the official or a member of their immediate family which is different from salaries paid to other employees of the government agency in the same job classification or position, or when the member of the public official's immediate family member is the only person in the job classification or position. (Regulation 18702.5(b)(1).)

Here, Director Hill receives no salary from the District and is no longer employed by Con Fire, but receives retirement benefits from the Contra Costa Employee Retirement Association. The facts state that there is no potential for a change in Director Hill's retirement benefits as a result of contracts between the two agencies, as his retirement benefits come from a retirement association that is independent and separate from Con Fire. Consequently, based on these facts, it is not reasonably foreseeable that District decisions involving Con Fire would have a material financial effect on Director Hill's personal finances.

Section 1090

Under Section 1090, public officials "shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are a member." Section 1090 is concerned with financial interests, other than perhaps remote or minimal interests, that prevent public officials from exercising absolute loyalty and undivided allegiance in furthering the best interests of their agencies. (*Stigall v. Taft* (1962) 58 Cal.2d 565, 569.) Under Section 1090, "the prohibited act is the making of a contract in which the official has a financial interest." (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.) A contract that violates Section 1090 is void, regardless of whether the terms of the contract are fair and equitable to all parties. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646-649.) Additionally, a decision to modify, extend, or renegotiate a contract constitutes involvement in the making of a contract under section 1090. (See, e.g., *City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, 193; see also 98 Ops.Cal.Atty.Gen. 102 (2015) ["It is well settled that changes to existing contracts are themselves 'contracts' under section 1090"].) When Section 1090 is applicable to one member of a governing body of a public entity, the prohibition cannot be avoided by having the interested board member abstain; the entire governing body is precluded from entering the contract. (*Thomson, supra*, at pp. 647-649.)

The Legislature has created various statutory exceptions to Section 1090's prohibition where the financial interest involved is deemed to be a "remote interest," as defined in Section 1091, or a "noninterest," as defined in Section 1091.5. Under Section 1091(b)(13), an agency board member that receives salary, per diem, or reimbursement for expenses from another government entity has a remote interest in a contract between the two agencies. Under Section 1091.5(a)(9), an officer or employee of a government agency receiving salary, per diem, or reimbursement for expenses from another government entity has a noninterest in a contract between the two agencies "unless the contract directly involves the department of the governmental entity that employs the officer or employee, provided that the interest is disclosed to the body or board at the time of consideration of the contract, and provided further that the interest is noted in its official record." (Section 1091.5(a)(9).)

Director Hill is no longer a Con Fire employee and the facts state that there is "no potential" for a change in Director Hill's salary, benefits, or status as a result of a contract between the District and Con Fire. Director Hill's retirement benefits are received from the Contra Costa Employee

Retirement Association, rather than Con Fire itself, which “has no role or influence in the payment of or amount of the retirement benefit payment.”

Given the above, the situation is akin to the facts considered by the Attorney General in 85 Ops.Cal.Atty.Gen. 6 (2002). There, the Attorney General considered whether a city councilmember for “City A” could take part in contracts between City A and “City B” for the procurement of law enforcement services, where the city councilmember was a retired police officer for City B’s police department and received retirement benefits from City B. The Attorney General opined:

Here, the City A council member is no longer an employee of City B's police department (or of City B's other departments). If he were, the contract between City A and City B for law enforcement services could still be executed, either without the council member's participation as an employee of City B's police department (§ 1091, subd. (b)(13)) or with his participation as an employee of some other City B department (§ 1091.5, subd. (a)(9)). (See 83 Ops.Cal.Atty.Gen. 246, 247-250 (2000); 78 Ops.Cal.Atty.Gen., *supra*, at pp. 368-374.) Given these statutory provisions and the lack of an employment relationship between the council member and City B, we find that section 1090's prohibition is inapplicable under these unique circumstances.

We thus conclude that for purposes of section 1090, City A's council member would not be financially interested in a contract with City B for the procurement of law enforcement services even though he was formerly employed by City B's police department and is currently receiving retirement benefits from City B.

(85 Ops.Cal.Atty.Gen. at pp. 7-8.)

Here, as in the Attorney General Opinion, Director Hill does not have a remote interest under Section 1091(b)(13) because he is not employed by, or receiving benefits from, either agency.³ Likewise, his relationship to a contract between the District and Con Fire is even more attenuated than the non-interest identified in Section 1091.5(a)(9). Consequently, to the extent a contract between the District and Con Fire would not impact Director Hill's retirement benefits, Section 1090 does not prohibit him from taking part in such a contract. To the extent that a contract between the District and Con Fire may impact Director Hill's retirement benefits, he should seek additional advice.

³ This is in contrast to the advice provided to Director Hill in *Pio Roda* Advice Letter, No. A-21-054, in which we advised, due to his status at the time as a Con Fire employee, that he had a remote interest in a contract between Con Fire and the District under Section 1091(b)(13).

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Dave Bainbridge
General Counsel

By:



Kevin Cornwall
Senior Counsel, Legal Division

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