



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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April 4, 2024

Andre de Bortnowsky
Victorville City Attorney
30077 Agoura Court Suite 210
Agoura Hills, CA 91301

Re: Your Request for Advice
Our File No. A-24-023

Dear Mr. de Bortnowsky:

This letter responds to your request for advice on behalf of City of Victorville Councilmembers regarding Section 84308 of the Political Reform Act (the “Act”).¹ Please 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.

QUESTION

As the City of Victorville (“City”) must review and renew its annual contract with the County of San Bernardino (“County”) for law enforcement services, does Section 84308 prohibit current City Councilmembers from accepting, soliciting, or directing contributions in excess of \$250 from either the Sheriff’s Employees’ Benefit Association (“SEBA”) (the recognized bargaining unit for the Sheriff’s Department employees); Sheriff’s Department employees; or non-law enforcement employees of the County?

CONCLUSION

No. Under the facts provided, none of the potential contributors meet the definition of a “participant” in the contract that will go before the City Council, and Councilmembers are not prohibited from accepting, soliciting, or directing contributions in excess of \$250 from them.

FACTS AS PRESENTED BY REQUESTER

The City is a charter city and municipal corporation located in San Bernardino County. The City contracts with the San Bernardino County Sheriff’s Department (“Sheriff’s Department”) for law enforcement (police) services and has done so since 1963. The contract is between the City and the County. The Victorville City Council (“City Council”) must review and approve the Sheriff’s

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.

Department contract for law enforcement services on an annual basis. The City does not control the salaries of Sheriff's Department employees. The contract only relates to the amount or level of law enforcement services provided. You also provided a copy of a prior version of this agreement. We note that the contract specifically states that, while every Sheriff's Department employee shall be deemed to be an officer of the City for purposes of providing services under the contract, they remain employees of the County, and do not receive any City pension, civil service, or other status or right.

SEBA is the recognized bargaining unit for the Sheriff's Department employees. The City has no memorandum of understanding ("MOU") or other labor agreement with SEBA, as the City's law enforcement services are provided solely under the above-described contract with the County. At present, there are no contemplated proceedings pending before the City Council directly with SEBA; however, the annual law enforcement contract with the County will come before the City Council for approval later this year.

ANALYSIS

The Act's "pay to play" restrictions, contained in Section 84308, aim to ensure that officers of local government agencies are not biased by contributors or potential contributors of large campaign contributions, who might appear before them in a proceeding involving a license, permit or entitlement for use.

As pertinent to the questions posed, Section 84308 imposes two requirements on officers subject to the section. First, Section 84308(b) states: "[w]hile a proceeding involving a license, permit, or other *entitlement for use* is pending, and for 12 months following the date a final decision is rendered in the proceeding, an officer of an agency shall not accept, solicit, or direct a contribution of more than two hundred fifty dollars (\$250) from any party or a party's agent, or from any participant or a participant's agent if the officer knows or has reason to know that the participant has a financial interest" (Emphasis added.)²

Second, Section 84308(c) requires that if an officer has received a contribution of more than \$250 during the past 12 months from a party or participant in a proceeding involving a license, permit or other entitlement for use pending before an agency, the officer must disclose that fact on the record of the proceeding and must recuse himself from the proceedings.

Accepting a Contribution

As discussed above, Section 84308 places restrictions on the acceptance of contributions by officers of agencies under specified circumstances. Whereas a proceeding is considered "pending"

² Section 84308(a)(5) defines "license, permit, or other entitlement for use" as "all business, professional, trade, and land use licenses and permits and all other entitlements for use, including all entitlements for land use, all contracts (other than competitively bid, labor, or personal employment contracts), and all franchises." While a "labor contract" does not qualify as a "proceeding" under Section 84308, the contract at issue is a contract for services, and does not constitute a "labor contract," which Regulation 18438.2 defines as "contract or agreement reached through collective bargaining or with a representative group regarding the salary, benefits, or terms and conditions under an employment or retirement policy for employees or retirees."

for a party as soon as it is before the jurisdiction of the agency for its decision or other action, a proceeding is considered “pending” for an individual *officer* based on different criteria. For an officer, a proceeding involving a license, permit, or other entitlement for use is pending, under Regulation 18438.2(b)(1), when:

(A) The decision is before the officer for the officer’s consideration. If the officer is a member of a governing body, this includes any item placed on the agenda for discussion or decision at a public meeting of the body; or

(B) The officer knows or has reason to know a proceeding involving a license, permit or other entitlement for use is before the jurisdiction of the agency for its decision or other action, and it is reasonably foreseeable the decision will come before the officer in the officer’s decisionmaking capacity.

You state that the annual contract for law enforcement services with the County will come before the City Council for approval later this year. Under the applicable standard for determining whether this is a “pending” proceeding, found in Regulation 18438.2(b)(1)(B), the Councilmembers are aware that the contract is within its jurisdiction, and will come before the City Council in its decision-making capacity later this year. As such, the contract for law enforcement services is a “pending” proceeding for proposes of Section 84308.

Party under Section 84308

Section 84308(a)(1) defines “party” to mean “any person who files an application for, or is the subject of, a proceeding involving a license, permit, or other entitlement for use.” The contract for law enforcement services is between the City and the County. The City does not control the salaries of Sheriff’s Department employees. The contract only relates to the amount or level of law enforcement services provided. The City has no MOU or other labor agreement with SEBA. As such, the proceedings pending before the City Council do not involve SEBA. Therefore, SEBA is not a “party” to this decision. At issue is whether SEBA would meet the definition of a “participant” in the proceeding, such that the Councilmembers would not be permitted to accept the contributions in question, because, according to your facts, they know that the contract for law enforcement services will come before them in a decisionmaking capacity later this year. First, we must examine whether these contributors meet the definition of a “participant” under Section 84308.

Participant under Section 84308

Section 84308(a)(2) states that a “participant” is “any person who is not a party but who actively supports or opposes a particular decision in a proceeding involving a license, permit, or other entitlement for use and who has a financial interest in the decision, as described in Article 1 (commencing with Section 87100) of Chapter 7.” Section 84308(a)(2) states that a person “actively supports or opposes a particular decision in a proceeding” if the person “lobbies in person the officers or employees of the agency, testifies in person before the agency, or otherwise acts to influence officers of the agency” which includes public comments, direct communications, and public testimony. (See Regulation 18438.4.).

Assuming that SEBA, its representatives, Sheriff's Department employees, or non-law enforcement employees of the County, act to influence the decision of the City Council regarding the contract for law enforcement services, the first part of the "participant" test will be met. Next, we examine the second part of the "participant" test: whether SEBA, Sheriff's Department employees, or non-law enforcement employees of the County have a "financial interest" in the contract for law enforcement services under the Act. Section 87103 provides that an official has a financial interest in a decision 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 or the official's specified economic interests. Those specified interests include a business entity interest and source of income interest. (Section 87103.) We apply this standard to the potential contributors.

SEBA

SEBA is not explicitly involved in the contract for law enforcement services, as it is neither a party to, nor the subject of, the Council's decision. (Regulation 18701.) The appropriate standard for determining whether a financial effect is reasonably foreseeable for an entity not explicitly involved, is if the financial effect of the decision can be recognized as a realistic possibility and more than hypothetical or theoretical. (Regulation 18701(b).) The most applicable materiality standard, relative to determining materiality for decisions affecting a union organization, is found in Regulation 18702.3(a)(3), relating to nonprofit organizations.

The reasonably foreseeable financial effect of a governmental decision on an official's financial interest in a source of income is material if the source is a nonprofit organization and the decision may result in an increase or decrease of the organization's annual gross receipts, or the value of the organization's assets or liabilities, in an amount equal to or greater than \$1,000,000, or five percent of the organization's annual gross receipts and the increase or decrease is equal to or greater than \$10,000. (Regulation 18702.3(a)(3)(A).) The financial effect is also material if the decision may cause the organization to incur or avoid additional expenses or to reduce or eliminate expenses in an amount equal to or more than \$250,000, or one percent of the organization's annual gross receipts and the change in expenses is equal to or greater than \$2,500. (Regulation 18702.3(a)(3)(B).)

For the union organization, SEBA, its support for the continuation of the existing contract for law enforcement services would relate to the continuation of these services that a select group of its members continue to provide, as Sheriff's Department employees, to the City. The contract with the City does not control the salaries of those Sheriff's Department employees. As such, there are no facts indicating that the union organization itself would experience an increase or decrease in annual gross receipts, or incur or avoid additional expenses, in excess of the materiality thresholds identified above as a result of the City renewing its contract with the County.

Sheriff's Department Employees and non-law Enforcement Employees of the County

Section 82030(b)(2) excludes salary or benefits from a "state, local or federal government agency" from the definition of "income." Regulation 18702.5(a) sets forth the materiality standard applicable to a decision's reasonably foreseeable financial effect on an official's personal finances, also referred to as a "personal financial effect," and provides that such an 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."

Based on the facts presented, there is no evidence that the City's upcoming decision concerning the renewal of the contract for law enforcement services will result in a "personal financial effect" on Sherriff's Department employees, as the City does not control the salaries of Sheriff's Department employees, and the contract only relates to the amount or level of law enforcement services provided. The City has no MOU or other labor agreement with SEBA. The contract specifically states that, while every Sheriff's Department employee shall be deemed to be an officer of the City for purposes of providing services under the contract, they remain employees of the County, and do not receive any City pension, civil service, or other status or right.³ As such, the County, and not the City, is responsible for the terms of any labor agreements, personnel, or compensation related decisions. The facts presented do not indicate that there would be any effect on non-law enforcement employees of the County, who would not be subject to the contemplated contract. Therefore, neither SEBA; Sheriff's Department employees; nor non-law enforcement employees of the County meet the definition of a "participant" under Section 84308, and Councilmembers are not prohibited from accepting, soliciting, or directing contributions in excess of \$250 from these potential contributors.

If you have other questions on this matter, please contact me by email at znorton@fppc.ca.gov.

Sincerely,

Dave Bainbridge
General Counsel

Zachary W. Norton

By: Zachary W. Norton
Senior Counsel, Legal Division

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³ In addition, we note that, under an exception to that materiality standard set forth in Regulation 18702.5(b)(1), a personal financial effect is not material if the decision would affect only the salary, per diem, or reimbursement for expenses the public official receives from a federal, state, or local government agency. However, this exception does *not* apply if the decision is to appoint, hire, fire, promote, demote, suspend without pay or otherwise take disciplinary action with financial sanction against the official, or to set a salary for the official that is different from salaries paid to other employees of the agency in the same job classification or position. However, as the materiality is not met, we need not analyze this exception.