

December 4, 2014

Craig Price  
General Counsel  
Santa Barbara Unified School District  
8 East Figueroa Street, Suite 300  
Santa Barbara, CA 93101-2762

Re: Your Request for Advice  
**Our File No. A-14-189**

Dear Mr. Price:

This letter responds to your request for advice regarding the conflict of interest provisions of Government Code Section 1090. While the Fair Political Practices Commission (the “Commission”) may also provide advice on the application of the separate conflict of interest provisions of the Political Reform Act (the “Act”),<sup>1</sup> a separate analysis under the Act is unnecessary at this time.<sup>2</sup> Please note that we do not provide advice on any other conflict of interest restrictions, if applicable, outside the Act or Section 1090. We are also not a finder of fact when rendering advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Therefore, all advice provided assumes the facts the requester provides to us are complete and accurate. If this is not the case, then our advice could be different.

In regard to our advice on Section 1090, we are required to forward your request and all pertinent facts relating to the request to the Attorney General’s Office and the Santa Barbara County District Attorney’s Office, which we have done. (Section 1097.1(c)(3).) We did not receive a written response from either entity. We are also required to advise you that, for purposes of Section 1090, the advice “is not admissible in a criminal proceeding brought against any individual other than the requestor.” (Section 1097.1(c)(5).)

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<sup>1</sup> 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 18110 through 18997 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.

<sup>2</sup> The board member is not subject to the Act’s conflict of interest provisions so long as the board member recuses himself from the agency’s decisions. In light of the conclusion that the board member must abstain from participating in the decision under Government Code Section 1090, further advice under the Act is not necessary. We do note, however, that the Act sets forth specific procedures for public officials who manage public investments to properly recuse themselves from the governmental decision. (Section 87105; Regulation 18702.5.)

## QUESTION

Under the conflict of interest provisions of Section 1090, may a school district hire a temporary teacher to a vacant probationary position despite the fact that the teacher is the spouse of a member of the district's school board?

## CONCLUSION

The rule of necessity permits the school district to decide whether to fill a vacant position and to consider Ms. Paz for the position as well as any "preferential reemployment right" she may have. However, Board Member Paz must abstain from any participation in these decisions.

## FACTS

Whitney Paz has been employed as a certificated temporary teacher with the Santa Barbara Unified School District (the "District") since the 2009-2010 academic year. As a temporary teacher, Ms. Paz has taught Spanish in various schools throughout the District for the last five consecutive years. Ms. Paz's spouse, Dr. Pedro Paz, was elected to the District's Board of Education (the "School Board") in November 2012.

The District will have probationary Spanish teacher positions available in the next academic year for which Ms. Paz is both certified and qualified to serve. As you have presented the facts, the District is mandated to give Ms. Paz a "preferential right of reemployment" for the vacant positions, under Education Code Section 44918(c).<sup>3</sup>

## ANALYSIS

Section 1090 prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Section 1090 is concerned with financial interests, other than 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.) Section 1090 is intended "not only to strike at actual impropriety, but also to strike at the appearance of impropriety." (*City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, 197.)

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

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<sup>3</sup> Education Code Section 44918(c) provides that if a temporary teacher was released pursuant to Education Code Section 44954(b), and has nevertheless been retained as a temporary employee by the district for 75 percent of two consecutive years, "that employee shall receive first priority if the district fills a vacant position, at the grade level at which the employee served during either of the two years, for the subsequent school year. In the case of a departmentalized program, the employee shall have taught in the subject matter in which the vacant position occurs."

violates Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.) The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Id.* at pp. 646-649.)

In this instance, it is not contested that Board Member Paz is a public officer subject to the provisions of Section 1090, that Ms. Paz's employment contract constitutes a contract for purposes of Section 1090, and that Board Member Paz is presumed to be involved in the making of all contracts by the School Board and District. The determinative questions are whether Board Member Paz has a financial interest in the contract and, if so, whether the rule of necessity may apply.

### **Is there a financial interest in the contract?**

Under Section 1090, "the prohibited act is the making of a contract in which the official has a financial interest" (*People v. Honig, supra*, at p. 333), and officials are deemed to have a financial interest in a contract if they might profit from it in any way. (*Ibid.*) Generally, a member of a board or commission always has a financial interest in his or her spouse's source of income for purposes of Section 1090. (See, e.g., 78 Ops.Cal.Atty.Gen. 230, 235 (1995).) Thus, Board Member Paz will have a financial interest in his spouse's employment contract unless an exception applies.

There are 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. The only one of these exceptions implicated by the facts provided is the noninterest exception in Section 1091.5(a)(6).

In pertinent part, Section 1091.5 states the following:

"(a) An officer or employee shall not be deemed to be interested in a contract if his or her interest is any of the following:

[¶] ... [¶]

"(6) That of a spouse of an officer or employee of a public agency in his or her spouse's employment or officeholding if his or her spouse's employment or officeholding has existed for at least one year prior to his or her election or appointment."

The leading case on the scope of Section 1091.5(a)(6) is *Thorpe v. Long Beach Community College District* (2000) 83 Cal.App. 4th 655, in which the court narrowly construed the exception to mean that one spouse could retain his or her employment even though the other spouse was a member of a board that participated in the employment contract, so long as the terms of the employment did not change.

Accordingly, the determinative question is whether or not hiring a temporary employee to a probationary position is a change in the terms of employment. However, in asking for assistance regarding this particular exception, you have noted that an opinion by the Attorney General's Office previously found that the exception applied where a school board member's spouse would receive permanent employment status at the conclusion of the spouse's probationary period. (87 Ops.Cal.Atty.Gen. 23 (2004). Narrowly construing Section 1091.5(a)(6), as mandated in the *Thorpe* decision, we do not find the Attorney General's determination, that the transition between probationary and permanent status results in no change to the terms of employment, to be controlling in the present situation.<sup>4</sup> Under the facts provided, you have stated that the difference between temporary and probationary teachers is their pre-termination rights. For instance, an employer's right to terminate either probationary or permanent employees is restricted by statute, whereas an employer's right to terminate a temporary employee is not so restricted. This difference cannot be overlooked, as temporary teachers fill the short range needs of a school district and are offered only minimal job security: "A school district is not required to provide any reason or offer a hearing if it elects to release or not reelect a temporary teacher; all that is required is the school district's issuance of statutory notice pursuant to [Education Code Section 44954]." (*Henderson v. Newport-Mesa Unified School Dist.* (2013) 214 Cal.App. 4th 478, 491.)<sup>5</sup>

Moreover, in analyzing the transition from probationary to permanent status, the Attorney General emphasized the fact that a probationary teacher could "attain permanent classification without the governing board making a decision to 'reelect' the teacher." In other words, the probationary teacher automatically became a permanent employee at the conclusion of the probationary period unless the board acted to terminate the employee. In Board Member Paz's circumstances, Ms. Paz's transition to a probationary position is not automatic. Even assuming that the District must give Ms. Paz "first priority" for a vacant position, Ms. Paz has a right to "first priority" only to the extent that the District actually decides to fill a vacant position. Additionally, the right to "first priority" under Section 1091.5(a)(6) has not been interpreted to give a temporary teacher a right to first refusal for the vacant positions. The right to "first priority" does not mean that a school district is obligated to hire a temporary teacher without regard to qualifications, and a district "is entitled to determine the qualifications necessary for a candidate to fill the vacant position and to assess whether [the candidate] meets them." (*Henderson v. Newport-Mesa Unified School Dist.*, *supra*, at p. 496.)

For these reasons, we find that hiring a temporary teacher to a probationary position is a significant change in the teacher's terms of employment, and that the noninterest exception in Section 1091.5(a)(6) does not apply.

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<sup>4</sup> We express no opinion regarding the application of Section 1091.5(a)(6) to the transition from a probationary to a permanent position.

<sup>5</sup> School districts may "release" certificated temporary employees "[a]t the pleasure of the board prior to serving during one school year at least 75 percent of the number of days the regular schools of the district are maintained" (§ 44954(a)), and "[a]fter serving during one school year the number of days set forth in subdivision (a), if the employee is notified before the end of the school year of the district's decision not to reelect the employee for the next succeeding year" (§ 44954(b)).

**Does the Rule of Necessity Apply?**

A “rule of necessity” has been applied in limited circumstance to allow the making of a contract that Section 1090 would otherwise prohibit. (88 Ops.Cal.Atty.Gen. 106, 110 (2005).) Under the rule of necessity, a government board may carry out essential duties of the board despite the existence of a conflict where the board is the only one who may legally act. (See 69 Ops.Cal.Atty.Gen. 102, 109(1986). Previously, the Attorney General has applied the rule of necessity to allow a school board to enter into a memorandum of understanding with a teachers’ association even when a board member is married to a tenured teacher (69 Ops.Cal.Atty.Gen. 102 (1986)), and a community college board to negotiate with its faculty for salary and benefits even though a board member is a retired faculty member whose health benefits are tied to current faculty benefits (89 Ops.Cal.Atty.Gen. 217 (2006)).

In this matter, we believe a similar rationale applies. Ultimately, the School Board is responsible for the allocation of the District’s resources, including staffing levels and the allocation of positions, and is required under the Education Code to give “first priority” to certain temporary teachers when filling vacant positions. Accordingly, we find that the rule of necessity permits the District and School Board to decide whether or not to fill a vacant position and to consider Ms. Paz for the position, as well as any “preferential reemployment right” she may have.

However, we note that when the “rule of necessity” applies to an official on a multi-member board or body, the Attorney General has concluded that the interested official must abstain from any participation in the decision. In other words, the rule permits the body to make the contract, so long as the financially interested official does not participate in the body’s decision. (See 89 Ops.Cal.Atty.Gen. 217 (2006); 88 Ops.Cal.Atty.Gen. 106, 112 (2005).) Accordingly, in the limited circumstances described above, the School Board may decide to fill a vacant position and consider Ms. Paz as required by the Education Code, but Board Member Paz must abstain from any participation in these decisions.

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

Sincerely,

Zackery P. Morazzini  
General Counsel

By: Brian G. Lau  
Senior Counsel, Legal Division

BGL:jgl