



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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June 2, 2015

William D. McMinn
Deputy General Counsel
San Diego Unified Port District
3165 Pacific Highway
San Diego, CA 92112-0488

Re: Your Request for Advice
Our File No. A-15-069

Dear Mr. McMinn:

This letter responds to your request for advice on behalf of the San Diego Unified Port District (“District”) and Commissioner Daniel Malcolm regarding the conflict of interest provisions of the Political Reform Act (the “Act”) and Section 1090.¹ Please note that we do not advise on any other area of law, including Public Contract Code or common law conflicts of interest. We are also 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.

Pursuant to Section 1097.1(c)(4), we have forwarded your request to the Attorney General’s Office and the San Diego District Attorney’s Office concerning potential issues raised under Section 1090 and we did not receive a written response from either entity.

Please note that the following advice is not admissible in a criminal proceeding against any individual other than the requestor.²

QUESTIONS

1. Does the Commissioner have a conflict of interest under the Act as a result of his son accepting a paid seasonal position with the City?
2. Does the Commissioner have a conflict of interest under Section 1090 as a result of his son accepting a paid seasonal position with the City?

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 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.

² Section 1097.1(c)(5).

CONCLUSIONS

1-2. No. These rules, if they apply, only apply when the child is a *dependent* of the official. Commissioner Malcolm's son is over 18 and is not currently claimed as a dependent. Accordingly, Commissioner Malcolm has no interest in his son's income from the City. Therefore, the Commissioner would have no conflict of interest under the Act or Section 1090 and may participate in District decisions affecting the City.

FACTS

The Board of Port Commissioners govern the District and has jurisdiction over tidelands surrounding the San Diego Bay, submerged lands in the Bay, and any other lands acquired by the District, which are held in trust for the benefit of the people of the State of California.

Port Commissioner Malcolm is appointed by the City of Imperial Beach. In his position as Commissioner, he will be asked to participate in decisions that come before the Board that could affect the City. The District also provides funding to reimburse the City for services it provides to the District.

The District and the City are parties to agreements that require the District reimburse the City for the pro-rata costs of sheriff, fire, emergency medical, lifeguard, animal control services and certain maintenance activities provided by the City upon the District's tidelands within the City's limits. The Board appropriates funding for the agreements annually during its budget process. The terms of the agreements are for nine years, beginning on July 1, 2012 and terminating on June 30, 2021.

The Commissioner's son will be receiving a salary from the City as a Lifeguard I, a paid seasonal position. The Commissioner's son is over 18 and is not currently claimed as a dependent by the Commissioner on a tax return, but was claimed as a dependent in 2013. The son currently resides at a separate college residence and does not provide any rent or income to the Commissioner. The Commissioner is paying tuition and normal college costs. Proceeds from the son's job will not contribute toward any of those payments or costs, as any money the son makes from the job will be his to keep.

ANALYSIS

The Act, in Section 87100, and Section 1090 both generally prohibit public officials from participating in government decisions in which they have a financial interest. The Act applies to all government decisions and Section 1090 applies to government decisions relating to the making of contracts, unless an exception applies.

Potentially Disqualifying Interests under the Act:

Section 87103 describes the types of interests held by a public official that may pose a possible conflict under Section 87100.

This includes an official's personal finances and those of his or her immediate family. This is known as the "personal financial effects" rule.³ Under Regulation 18702.5(a), "the financial effect is material if the official or the official's immediate family member will receive a measurable financial benefit or loss from the decision."

Section 82029 defines the term "immediate family" as "the spouse and dependent children."

Regulation 18229.1 defines a "dependent child" of a public official as someone "who is under 18 years old *and* whom the official is entitled to claim as a dependent on his or her federal tax return." (Emphasis added.)

You indicate that Commissioner Malcolm's son is "over 18 and is not currently claimed as a dependent." Accordingly, Commissioner Malcolm has no interest in his son's income from the City. Therefore, he would have no conflict of interest under Section 87100 if he participated in District decisions affecting the City.

Financial Interests under Section 1090:

Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Under Section 1090, "the prohibited act is the making of a contract in which the official has a financial interest."⁴ Officials are deemed to have a financial interest in a contract if they might profit from it in any way.⁵

Although Section 1090 does not specifically define the term "financial interest," case law and statutory exceptions to the basic prohibition indicate that the term is to be liberally interpreted, and prohibited financial interests may be indirect as well as direct, and may involve financial losses, or the possibility of losses, as well as the prospect of pecuniary gain.⁶

Under Section 1091(b)(4), an official has only a remote interest in the earnings of his or her *minor* children. Furthermore, the official must have a specific financial interest in the contracts of his or her adult children in order to have a conflict under Section 1090.⁷

You state that Commissioner Malcolm's son lives in a separate residence, and is an adult and not a dependent of the official. Additionally, your facts suggest the Commissioner would not receive any financial benefit from his son's employment with the City.

³ Section 87103; Regulation 18702.5.

⁴ *People v. Honig*, *supra*, at p. 333.

⁵ *Ibid.*

⁶ *People v. Deysher* (1934) 2 Cal.2d 141, 146; *People v. Vallerga* (1977) 67 Cal.App.3d 847, 867.

⁷ 92 Ops.Cal.Atty.Gen. 19 (2009) and 88 Ops.Cal.Atty.Gen.222 (2005).

Based on these facts, we conclude that Commissioner Malcolm has no financial interest in his son's employment contract for purposes of Section 1090, and is not prohibited from participating in District decisions involving the City.

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

Sincerely,

Hyla P. Wagner
General Counsel

/s/

By: Emelyn Rodriguez
Counsel, Legal Division

ER:jgl