



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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September 25, 2015

Montoy Law Corporation
Hilda Cantu Montoy
2125 Kern Street, Suite 308
Fresno, CA 93721

Re: Your Request for Advice
Our File No. A-15-165

Dear Ms. Montoy:

This letter responds to your request for advice on behalf of a city council member regarding the conflicts-of-interest provisions under Government Code Section 1090 et seq.¹ Because the Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders assistance (*In re Oglesby* (1975) 1 FPPC Ops. 71), this letter is based on the facts presented.

Please note that after forwarding your request to the Attorney General’s Office and the Fresno County District Attorney’s Office, we did not receive a written response from either entity. (See Section 1097.1(c)(4).) Finally, we are required to advise you that the following advice is not admissible in a criminal proceeding against any individual other than the requestor. (See Section 1097.1(c)(5).)

QUESTION

May the city of Kerman hire a council member as its city manager after he resigns from office?

CONCLUSION

No. Under Section 1090, he is deemed to have participated in making, and has a financial interest in, his employment contract and the contract would be void.

FACTS

You are the city attorney for the city of Kerman. The city is recruiting for a city manager position and the city council has appointed an ad hoc committee for this purpose. The committee is comprised of the mayor and another council member. A different city council member (the “Councilmember Candidate”) has submitted an application for the position.

At the July 1, 2015 city council meeting, the ad hoc committee recommended a recruitment process for recruiting both an interim and a permanent city manager and asked for direction from

¹ All further statutory references are to the Government Code, unless otherwise indicated.

the city council. At the meeting, there was considerable discussion concerning the process for hiring an interim city manager. As to the permanent City Manager position, there were questions and minimal discussion. The Councilmember Candidate asked about the cost of the recruitment that related to both the interim and permanent positions. He asked questions and made comments regarding the potential for a candidate in the interim position to be considered for the permanent position. There was no vote and the council by consensus instructed the ad hoc committee to proceed with the recruitment processes. The recommended process was very similar to a process used in recruiting the prior city manager.

ANALYSIS

Section 1090 generally 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 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.)

Section 1090 provides, in part, that “[m]embers of the Legislature, state, county, district, judicial district, and city officers or employees 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 members.” In relation to a public body, such as the city council, each member is deemed involved in the making of a contract by the body regardless of whether the member actually participates in the making of the contract. Therefore, as a member of the city council, the councilmember candidate is subject to the prohibitions of Section 1090.

We next consider whether the Councilmember Candidate would violate Section 1090 by taking the city manager position and entering into a contract with the city.² Section 1090 applies to officials who participate in any way in the making of the contract. The “making” of a contract has been interpreted to include planning, preliminary discussions, negotiations, compromises, reasoning, drawing of plans and specifications and solicitation for bids. (*City Council v. McKinley* (1978) 80 Cal.App.3d 204; see also *Stigall v. City of Taft, supra*, 58 Cal.2d 565.)

² General principles of contract law can be considered in determining whether a decision involves a contract (84 Ops.Cal.Atty.Gen. 34, 36 (2001); 78 Ops.Cal.Atty.Gen. 230, 234 (1995)), while keeping in mind that “specific rules applicable to Sections 1090 and 1097 require that we view the transactions in a broad manner and avoid narrow and technical definitions of ‘contract.’” (*People v. Honig, supra*, at p. 351 citing *Stigall, supra*, at pp. 569, 571.) Under general contract law, an enforceable contract is made when there has been an offer, an acceptance and consideration. An employment relationship involves an offer of employment and acceptance. Therefore, decisions regarding the employment of a City Manager involve a contract.

The question of when an official participates in “making” a contract where the final step of executing the contract occurs after the official’s resignation has been considered by the courts and Attorney General Opinions.

The question was addressed in *City Council v. McKinley*, where the court stated:

“If the date of final execution were the only time at which a conflict might occur, a city councilman could do all the work negotiating and effecting a final contract which would be available only to himself and then present the matter to the council, resigning his office immediately before the contract was executed. He would reap the benefits of his work without being on the council when the final act was completed. This is not the spirit or the intent of the law which precludes an officer from involving himself in the making of a contract.”

(*City Council v. McKinley*, *supra*, 80 Cal.App.3d at p. 212.)

In *Finnegan v. Schrader* (2001) 91 Cal.App.4th 572, a board member of a sanitary district was appointed to the position of District Manager after he resigned from the board. While on the Board, he announced at a board meeting that he was interested in the position and, at a later meeting, distributed a statement of his qualifications. The board offered him the position to be effective upon his resignation. The court held that his appointment to the District Manager position violated Section 1090.

In 66 Ops.Cal.Atty.Gen. 156 (1983), the Attorney General’s office advised that county employees could not propose an agreement for consultant services, then resign, and provide such consulting services.

More recently, in the *Burns* Advice Letter, No. A-15-096, a member of a transit authority asked whether he could resign from office and then apply for a position for executive director of the authority where the authority had already appointed a search committee for the position. We found that he had participated in the making of the employment agreement and, therefore, was prohibited from taking the position.

The common fact of these cases, opinions, and advice letters is that the official resigned from office shortly after the official knew there would be a contract and then applied or bid on the contract. Here, the Councilmember Candidate knows there will be an employment contract and has participated in the making of the contract from the time the city council appointed the ad hoc committee. Therefore, he is prohibited by Section 1090 from taking the city manager position and such a contract would be void.

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

Sincerely,

Hyla P. Wagner
General Counsel

/s/

By: Valentina Joyce
Counsel, Legal Division

VJ:jgl