



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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August 21, 2019

Carlyn M. Drivdahl
Deputy County Counsel
2 South Green Street
Sonora, California 95370

Re: Your Request for Advice
Our File No. A-19-034

Dear Ms. Drivdahl:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the Act)¹ and Section 1090 on behalf of Ryan Campbell, a member of the County of Tuolumne (the County) Board of Supervisors (the Board). Please note that we are only providing advice under the Act and Section 1090. Also, 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.

Regarding 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 Tuolumne 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).)

QUESTIONS

1. May the Board appoint a new Public Defender if Supervisor Campbell recuses himself from the decision-making process because his wife is a candidate for the position?
2. May the Board create an Assistant Public Defender position if Supervisor Campbell recuses himself from the decision-making process because his wife is a candidate for the position?
3. May Supervisor Campbell participate in decisions regarding the Public Defender's budget and labor negotiations with the Attorney Unit?

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.

CONCLUSIONS

1. Because his wife is a candidate for the position, Supervisor Campbell and the Board have a conflict of interest under Section 1090. The Board and Supervisor Campbell may not appoint Ms. Gorman to the position so long as Supervisor Campbell serves on the Board.

2. Because his wife is a candidate for the position, Supervisor Campbell and the Board have a conflict of interest under Section 1090. The Board and Supervisor Campbell may not appoint Ms. Gorman to the position so long as Supervisor Campbell serves on the Board.²

3. While Supervisor Campbell has a potential interest in the County's contract with his wife's attorney unit under Section 1090, Ms. Gorman has maintained her position as a deputy public defender for over one year. Thus, Supervisor Campbell's interest is a non-interest under Section 1091.5(a)(6) for purposes of decisions involving the approval of the Public Defender's budget, as well as bargaining with the Attorney Unit, and he may participate in these decisions. Similarly, the Act does not prohibit Supervisor Campbell from taking part in the decisions.

FACTS PROVIDED BY REQUESTER

A. Public Defender.

Supervisor Campbell is married to Hallie Gorman, who is and has been a County Deputy Public Defender for approximately 7.5 years. The current Public Defender is retiring this summer. The Board appoints the Public Defender and the position serves at the pleasure of the Board in accordance with prevailing legal authority. Ms. Gorman has expressed interest in applying for, and being appointed as, the Public Defender.

B. Assistant Public Defender.

The Board approves the creation of all County job positions and specifications. Currently, the Public Defender's Office consists of one Public Defender, three deputy public defenders, an investigator and clerical staff. The County Administrator is interested in potentially creating the position of Assistant Public Defender who would, in the Public Defender's absence, act as the Public Defender and take on daily office supervision. If the position was created, then the Public Defender would appoint the Assistant Public Defender.

C. Decisions Regarding Budget and Labor Negotiations.

The Board approves the budget for the Public Defender's Office, as it does with all County departments, and directs its labor negotiators to bargain with all bargaining units, including the Attorney Unit that includes the deputy public defenders. Ms. Gorman has maintained her position as deputy public defender for over one year.

² In regards to conclusions 1 and 2, to the extent that the County has not taken any action concerning the pending vacant Public Defender and Assistant Public Defender positions, Ms. Gorman may apply for these positions if Supervisor Campbell resigns from his position on the Board before the City acts on the Public Defender and Assistant Public Defender positions.

ANALYSIS

A. Public Defender and Assistant Public Defender Positions.

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.) A contract is typically “made” on mutual assent of the involved parties. (*Stigall, supra*, at p. 569.) Making or participating in making a contract has been broadly construed to include instances where a public official has influence over the contract or its terms. (See 80 Ops. Cal. Atty. Gen. 41.)

When members of a public board, commission or similar body have the power to execute contracts, each member is conclusively presumed to be involved in the making of all contracts by his or her agency regardless of whether the member actually participates in the making of the contract. (*Thomson v. Call, supra* at pp. 645 & 649; *Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201; 89 Ops.Cal.Atty.Gen. 49 (2006).)

In determining whether a financial interest exists under Section 1090, courts “generally focus on whether the contract in question could confer some type of pecuniary advantage to the target of a Section 1090 inquiry.” (*Eden Township Healthcare District v. Sutter Health* (2011) 202 Cal.App.4th 208, 225.) Whether a proscribed financial interest exists in a public contract is primarily a question of fact. (*People v. Vallerga* (1977) 67 Cal.App.3d 847, 865.)

An official has an interest in the community and separate property income of his or her spouse. (*Thorpe v. Long Beach Community College Dist.* (2000) 83 Cal.App.4th 655; 89 Ops.Cal.Atty.Gen. 69 (2006).) A member of a board or commission always has a financial interest in his spouse’s source of income for purposes of Section 1090. (78 Ops.Cal.Atty.Gen. 230, 235 (1995).) A married official “stands in the shoes of his spouse.” (89 Ops.Cal.Atty.Gen. 258, 264 (2006).)

In this case, County has not taken any action concerning the selection of a new Public Defender. Based on the facts provided, the County has not engaged in any of the planning, preliminary discussions, negotiations, compromises, reasoning, drawing of plans and specifications and solicitation for bids that would ordinarily be involved in the making of a contract. Although a county board member is presumed to be participating in any contract before the county, we do not find that this presumption applies when a board member resigns prior to actual participation in the making of the contract. Therefore, if Supervisor Campbell resigns from his position on the Board,

which has not yet taken any action concerning the pending vacant Public Defender position, then Section 1090 will not bar consideration of Ms. Gorman's application for that position.

Based on the facts provided, statutory exceptions to Section 1090 set forth under Sections 1091 and 1091.5, which provide "remote interests" and "noninterests" respectively, do not apply. Section 1091.5(a)(6)³ is the provision most relevant to facts presented. Under this section, a public officer has a statutory noninterest in his or her spouse's employment "if his or her spouse's employment ... has existed for at least one year prior to [the officer's] election or appointment." (69 Ops.Cal.Atty.Gen. 255 (1986) [explaining that Section 1091(a)(6) requires one year or more in the same employment].) Section 1091.5(a)(6) applies to a spouse who maintains status quo employment for over one year, but does not apply to changes in employment status beyond mere restructuring of a current position. (*Thorpe v. Long Beach Community College District, supra*, 83 Cal.App.4th at p. 664.) Changes such as "a pay increase ... a new title, a new job description, substantial additional duties, and movement from a classified position in a bargaining unit to a supervisory position without a bargaining unit" indicate new employment to which the noninterest under Section 1091.5(a)(6) does not apply. (*Id.*)

Accordingly, this exception does not apply to the appointment of Supervisor Campbell's wife to the position of Public Defender or Assistant Public Defender. The Board may appoint Ms. Gorman only to the extent that the Board does not take any action regarding the position while Supervisor Campbell is in office.

B. Participation in Negotiations with the Attorney Unit.

Additionally, Supervisor Campbell has a potential interest in the County's contract with his wife's Attorney Unit under Section 1090. However, Supervisor Campbell's wife has maintained her position as a deputy public defender for over one year. The question is whether the noninterest exception in Section 1091.5(a)(6) applies to Supervisor Campbell's decisions that relate to the Attorney Unit and the Public Defender's budget in his wife's current position.

Under the Act,⁴ an official may participate in a decision affecting the salary or benefits of his or her spouse only if the decision applies equally to all employees in the same bargaining unit or representative group. (See Regulation 18702.5(b)(1).) Regulation 18704(d)(3) provides that:

Making, participating in, or influencing a governmental decision does not include: . . .
Actions by a public official relating to his or her compensation or the terms or conditions of his or her employment or consulting contract. However, an official may not make a decision to appoint, hire, fire, promote, demote, or suspend without pay or take disciplinary action with financial sanction against the official or his or her immediate family, or set a salary for

³ The remote interest and noninterest exceptions for receipt of government salary, set forth in Sections 1091(b)(13) and 1091.5(a)(9) respectively, apply where the contract would not result in personal or direct financial gain. (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1081.) Here, the contract would result in personal financial gain based on the facts provided. Thus, these statutory exceptions do not apply.

⁴ "Section 1090 and section 87100 of the PRA are two of the most important statutes in California addressing the problem of conflict of interest by public officials and employees. They both deal with a relatively small class of people, public officers and employees, and share the same purpose or objective, the prevention of conflicts of interests, and hence can fairly be said to be *in pari materia*." (*People v. Honig* (1996) 48 Cal.App.4th 289, 327.)

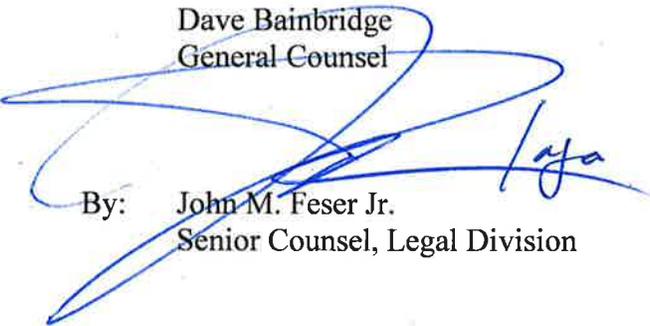
the official or his or her immediate family different from salaries paid to other employees of the government agency in the same job classification or position.

Based on the foregoing and the principle of "*in pari materia*," we find that Section 1090 must be interpreted consistently with the Act in this instance.⁵ To the extent that the changes to the collective bargaining agreement and Public Defender's budget do not change the status quo of Hallie Gorman's employment, and the decisions apply equally to all members of the Attorney Unit, Supervisor Campbell may take part in the decisions under the noninterest exception in Section 1091.5(a)(6) and under the Act.

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

Sincerely,

Dave Bainbridge
General Counsel



By: John M. Feser Jr.
Senior Counsel, Legal Division

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⁵ This is consistent with an Attorney General Opinion finding that, pursuant to Section 1091.5(a)(6), an elected official may participate in a collective bargaining agreement with a spouse's union one year after the official's reelection to office. (69 Ops. Cal. Atty. Gen. 102 (1986).)