



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
1102 Q Street • Suite 3000 • Sacramento, CA 95811
(916) 322-5660 • Fax (916) 322-0886

April 6, 2021

Randy J. Risner
Chief Assistant City Attorney
City of Vallejo
City Attorney's Office
555 Santa Clara Street
Vallejo CA 94590

Re: Your Request for Advice
Our File No. A-21-011

Dear Mr. Risner:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the "Act") and Government Code Section 1090, et seq.¹ Please note that we are only providing advice under the Act and Section 1090, not under other general conflict of interest prohibitions such as common law conflict of interest.

Also, 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.

We are required to forward your request regarding Section 1090 and all pertinent facts relating to the request to the Attorney General's Office and the 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).)

QUESTION

Is City Attorney Veronica Nebb precluded by the Act or Section 1090 from engaging the City in contracts with an outside law firm given that a former employer may join the law firm in question?

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.

CONCLUSION

No. As City Attorney Ms. Nebb has no financial interest in the contracts under the Act or Section 1090, she is not precluded from engaging with the outside firm on behalf of the City.

FACTS AS PRESENTED BY REQUESTER

You are the Chief Assistant City Attorney of the City of Vallejo and seek advice on behalf of City Attorney Veronica Nebb.

On November 16, 2020, Veronica Nebb became the City Attorney for the City of Vallejo. Prior to that, she was employed by Jeffrey A. Walter, a P.C. doing business as Walter & Pistole ("WP"). City Attorney Nebb was a full-time salaried employee with WP and was at no time a shareholder or partner, nor did she receive any share of equity from the firm. City Attorney Nebb departed WP on November 15, 2020 and her last income from WP was received on November 30, 2020 for work performed through November 15, 2020. City Attorney Nebb will not receive any future income from WP.

Jeffrey A. Walter has at all times since its inception been the principal shareholder of WP. Mr. Walter is currently in negotiations to join the law firm of Colantuono, Highsmith & Whatley, PC ("CHW") as a minority shareholder. It is anticipated that Mr. Walter will likely join CHW in January or February of 2021.

Concurrent with Mr. Walter's joining of CHW, WP will be transferring the contracts WP currently has with its four largest clients (all public agencies) to CHW. WP will continue to exist and will continue to do business in areas of law not related to municipalities. Mr. Walter will remain associated as a shareholder of WP. Neither WP, nor Mr. Walter, have ever provided legal services to, or received income from, the City of Vallejo.

In further information provided via email, City Attorney Nebb confirmed that she never received any offer of employment from CHW. When she signed the contract for the Vallejo position, she made clear to WP, and through them CHW, that she was taking a position with the City of Vallejo and resigning. Thus, at the time she assumed the role of City Attorney, she had no discussion or expectation of renewed employment with WP or CHW.

The City of Vallejo currently uses CHW as special counsel under an existing Master Outside Legal Counsel Legal Services Agreement entered into prior to Ms. Nebb becoming the City Attorney ("CHW Agreement"). The CHW Agreement was approved by the City Council based on a recommendation by then Interim City Attorney Randy Risner on July 23, 2020. It is anticipated that future cases, both litigation and other matters, could be assigned to CHW. In addition, there are two additional contracts with CHW related to class action litigation. Under current City of Vallejo policy, the assignment of cases to special counsel are solely within the purview of the City Attorney. City Council approval is only required when costs will exceed \$100,000 in a calendar year.

In light of the above facts, you seek to ascertain whether the Act or Government Code Section 1090 preclude City Attorney Nebb from participating in decisions to refer or not to refer additional Vallejo matters to CHW, or from participating in legal strategy on behalf of Vallejo in matters assigned to CHW prior to Ms. Nebb's tenure as the City Attorney.

ANALYSIS

The Act

Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. A public official has a “financial interest” in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on one or more of the public official’s interests. (Section 87103; Regulation 18700(a).)

Section 87103 of the Act lists several types of financial interests that can give rise to a conflict of interest, including:

- An economic interest in a business entity in which he or she has a direct or indirect investment of \$2,000 or more (Section 87103(a); Regulation 18702.1); or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d).)
- An economic interest in real property in which he or she has a direct or indirect interest of \$2,000 or more. (Section 87103(b); Regulation 18702.2.)
- An economic interest in any source of income, including promised income, aggregating \$500 or more within 12 months prior to the decision. (Section 87103(c); Regulation 18702.3.)
- An economic interest in any source of gifts to him or her if the gifts aggregate to \$500 or more within 12 months prior to the decision. (Section 87103(e); Regulation 18702.4.)
- An economic interest in his or her personal finances, including those of his or her immediate family -- this is the “personal financial effects” rule. (Section 87103; Regulation 18702.5.)

As City Attorney, Ms. Nebb no longer holds a position with WP, and does not hold any investment interest in the business entity. In regard to WP, the only interest applicable to her at this time is an interest in WP as a source of income aggregating to \$500 or more within the last 12 months. (Section 87103(c).)

A financial effect on a financial interest is presumed to be reasonably foreseeable if the financial interest is explicitly involved in a decision. (Regulation 18701(a).) An interest is explicitly involved in a decision if the interest is a named party in, or the subject of, a governmental decision before the official or the official's agency. Where a financial interest is not explicitly involved in a decision, as is the case here, the foreseeability standard is whether the financial effect can be recognized as a "realistic possibility and more than hypothetical or theoretical." (Regulation 18701(b).) And where a business entity is not explicitly involved in a decision, the reasonably foreseeable financial effect of a decision will be material where the decision may result in an increase or decrease of the entity's gross revenues and assets or liabilities, or where it impacts expenses. (Regulation 18702.1.)

Based on the facts provided, there is no reasonably foreseeable material financial effect on City Attorney Nebb's source of income, WP. Neither WP, nor Mr. Walter, have ever provided services to, or received income from the City of Vallejo, and there are currently no plans for WP to enter into a contract with the City.

Further, a public official has a financial interest in any *person* from whom he or she has received income aggregating \$500 or more within the prior 12 months, which includes an individual owning a 50% or greater interest in a business entity, or an individual with the power to direct the management and policies of the business entity. (Regulation 18700.1(a).) There is an exception, however, for "former employers," whereby a former employer does not constitute a source of income when: 1) all income from the employer was received or accrued to the public official prior to the time she became a public official; 2) the income was received in the normal course of the previous employment; and 3) there was no expectation by the public official at the time she assumed office of renewed employment with the former employer. (Regulation 18700.1(b).)

As the founder and principal shareholder of WP, City Attorney Nebb therefore, has an interest in Mr. Walter individually as a source of income of \$500 or more in the last 12 months. However, from the facts provided, it appears the "former employer" exception would be applicable here: all income derived from WP and Mr. Walter accrued to City Attorney Nebb prior to her assuming her role with the City of Vallejo; the income she received from these entities was in the normal course of an employee during her time of employment; and she has no expectation of renewed employment with WP.

Accordingly, City Attorney Nebb does not have a conflict with activity related to CHW based on any salary received from WP or Mr. Walter.² We caution, however, that this conclusion stands only to the extent there is no expectation of renewed employment with WP, or future employment with CHW.

² Because City Attorney Nebb does not hold an investment interest in WP (Section 82034), nor does she hold a business position within the entity (Section 87209), we need not examine whether CHW qualifies as a parent, subsidiary, or otherwise related business entity (Regulation 18700.2) of WP given Mr. Walter's involvement with both entities.

Section 1090

Section 1090 generally prohibits a public officer or employee from making or participating in the making of a contract in which he or she is financially interested. Section 1090 is concerned with financial interests, other than remote interests and noninterests, that prevent a public officer or employee from exercising absolute loyalty and undivided allegiance in furthering the best interests of his or her agency. (*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.) And the prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (Id. at pp. 646-649.)

From the facts provided, it does not appear City Attorney Nebb has any financial interest in either the previous contract entered into between the City and CHW, nor any subsequent matters which the City may engage CHW for. She does not stand to gain financially from any payments made to CHW. And even the tenuous connection of her former boss from WP potentially working with CHW will not benefit her, as she no longer receives compensation from WP.

Accordingly, City Attorney Nebb may participate in legal strategy on behalf of the City in matters assigned to CHW prior to her tenure, as well as participate in decisions as to whether to refer additional matters to CHW as well.

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

Sincerely,

Dave Bainbridge
General Counsel



By: Erika M. Boyd
Senior Counsel, Legal Division

EMB: dkv