



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
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August 11, 2021

Jonathan V. Holtzman  
General Counsel  
Moraga-Orinda Fire Protection District  
Renne Public Law Group  
350 Sansome Street, Suite 300  
San Francisco, CA 94104

Re: Your Request for Advice  
**Our File No. A-21-098**

Dear Mr. Holtzman:

This letter responds to your request for advice on behalf of Moraga-Orinda Fire Protection District Board Member Greg Baitx regarding the Political Reform Act (the “Act”)<sup>1</sup> and Section 1090. Please note that our statutory authority to provide advice is limited to the Act and Section 1090. Our analysis is based solely on the facts you provide. Thus, our advice, and any immunity it may provide, is as complete and accurate as the facts provided in your request for advice. If the facts underlying this advice change, then you should contact us for additional advice.

Please also note that the Commission does not provide advice regarding past conduct. (Section 1097.1(c)(2); Regulation 18329(b)(6)(A).) Nothing in this letter should be construed to evaluate any conduct that may have already taken place, and any conclusions contained in this letter only apply to prospective actions.

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 Contra Costa 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.” (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 (the “Commission”) are contained in Sections 18110 through 18998 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. Section 1097.1 sets forth the Commission’s jurisdiction with respect to Section 1090 et seq.

## QUESTIONS

Given that Moraga-Orinda Fire Protection District (the “MOFP District”) Board Member Greg Baitx is employed as a firefighter by a neighboring fire protection district and is a member of the United Professional Fire Fighters of Contra Costa County (the “Union”) in relation to his employment by that district:

(1) Does Section 1090 prohibit Board Member Baitx from making or participating in the making of, or the MOFP District from entering into, a potential labor agreement with the Union?

(2) Do the Act’s conflict of interest provisions prohibit Board Member Baitx from taking part in governmental decisions relating to the potential labor agreement?

## CONCLUSIONS

(1) No. Section 1090 does not prohibit Board Member Baitx from making or participating in the making of, or the MOFP District from entering into, the potential labor agreement with the Union because the noninterest exception of Section 1091.5(a)(7) applies based on the facts presented.

(2) No. The Act’s conflict of interest provisions do not prohibit Board Member Baitx from taking part in decisions relating to the potential labor agreement because the facts presented indicate it is not reasonably foreseeable those decisions would have a material financial effect on his personal finances.

## FACTS AS PRESENTED BY REQUESTER

You are the General Counsel of the Moraga-Orinda Fire Protection District and the authorized representative of District Board Member Greg Baitx. The MOFP District is an independent fire protection district formed under the Fire Protection District Law of 1987 (Health and Safety Code Section 13800 et seq.) and is governed by a five-member Board of Directors (the “MOFP District Board”). A neighboring independent fire protection district, the East Contra Costa Fire Protection District (“ECCFP District”), employs Board Member Baitx as a firefighter. The ECCFP District was also formed pursuant to the Fire Protection District Law of 1987.

The “Union,” the United Professional Firefighters of Contra Costa County, also referred to as Local 1230 of the A.F.L. - C.I.O., represents the firefighters of the MOFP District as well as the ECCFP District. The Union is a nonprofit organization organized under 26 U.S.C. Section 501(c)(5). Board Member Baitx is a member of the Union, but is not an officer of the Union, and does not serve in any leadership position with the Union.

The Union separately negotiates, and enters into labor agreements, with each fire protection district. In the course of negotiations, the Union and districts frequently cite comparability data from other nearby jurisdictions. The MOFP District Board is not bound by or limited to such data when setting wages, benefits, and terms and conditions of employment.

Such data is also relevant in nonbinding factfinding under the Meyers-Milias-Brown Act, provisions of which govern factfinding in certain labor disputes between public employers and public employee organizations.<sup>2</sup> You state that factfinding pursuant to that state law only occurs if the parties to the negotiation reach impasse, and that the factfinder makes nonbinding public recommendations for resolution of the labor dispute.

The MOFP District is in negotiations with the Union and eventually the MOFP District Board will be asked to approve a potential labor agreement with the Union on behalf of MOFP District firefighters.

## ANALYSIS

### *Section 1090*

Section 1090 generally prohibits public employees and officers, while working 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.” (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.) A contract that violates Section 1090 is void, regardless of whether the terms of the contract are fair and equitable to all parties. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646-9.) When Section 1090 applies to one member of a governing body of a public entity, the prohibition cannot be avoided by having the interested member abstain; the entire governing body is precluded from entering into the contract. (*Id.* at pp. 647-649.)

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 1091.5 sets forth noninterest exceptions to Section 1090’s prohibition. If a noninterest exception applies, the officer or employee at issue “shall not be deemed to be interested in a contract” for purposes of Section 1090 and may make or participate in the making of that contract. (Section 1091.5(a).)

Here, the determinative question is whether Board Member Baitx has a prohibitory financial interest in the potential labor agreement between the MOFP District and the Union under Section 1090 based on his membership in the Union or his employment with the ECCFP District whose future labor negotiations and agreements with the Union could be either positively or negatively impacted by the potential labor agreement between the MOFP District and the Union.

In regard to Board Member Baitx’s membership in the Union, the noninterest exception of Section 1091.5(a)(7) provides that an officer or employee is not financially interested in a contract due to being “a nonsalaried member of a nonprofit corporation” provided that the membership is disclosed to the governing body of the officer or employee’s agency at the time the governing body first considers the contract, and the membership is noted in the governing body’s official records.

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<sup>2</sup> See Section 3505.4(d)(5), which requires the “[c]omparison of the wages, hours, and conditions of employment of the employees involved in the factfinding proceeding with [those] of other employees performing similar services in comparable public agencies” by the factfinder.

The Union is a nonprofit organization organized under 26 U.S.C. Section 501(c)(5). Board Member Baitx is a member of the Union, but is not an officer of the Union, and does not serve in any leadership position with the Union. Therefore, the noninterest exception of Section 1091.5(a)(7) applies, so long as Board Member Baitx discloses his membership in the Union to the MOFP District Board when it first considers the potential labor agreement with the Union, and the membership is noted in the MOFP District Board's official records.

Notwithstanding the determination Board Member Baitx's membership in the Union is a noninterest, Board Member Baitx potentially has an interest in the potential labor agreement considering a potential impact on future labor negotiations and agreements between the Union and the ECCFP that may affect his income. As mentioned, the Union and districts frequently cite comparability data from other nearby jurisdictions so the contract between the MOFP District and the Union could negatively or positively impact future labor negotiations and agreements between the Union and the ECCFP District where Board Member Baitx is employed. However, under the noninterest exception of Section 1091.5(a)(9), an officer or employee is not financially interested in a contract due to:

[R]eceiving salary, per diem, or reimbursement for expenses from a government entity, unless the contract directly involves the department of the government entity that employs the officer or employee, provided that the interest is disclosed to the body or board at the time of consideration of the contract, and provided further that the interest is noted in its official record.

Although Board Member Baitx receives a salary and other employment benefits from the ECCFP District because he is employed as a firefighter by the ECCFP District, the potential labor agreement between the MOFP District and the Union does not directly involve the ECCFP District. The ECCFP District and the MOFPD District are separate government entities, each formed pursuant to the Fire Protection District Law of 1987. Therefore, this noninterest exception would also apply so long as Board Member Baitx discloses his employment by the ECCFP District as a firefighter to the MOFP District Board when it first considers the potential labor agreement with the Union, and his employment by the ECCFP District is noted in the MOFP District Board's official records.

Accordingly, Board Member Baitx may take part in the making of the potential labor agreement because the noninterest exceptions of Section 1091.5(a)(7) and Section 1091.5(a)(9) apply, so long as Board Member Baitx: (1) discloses his membership in the Union and his employment by the ECCFP District as a firefighter to the MOFP District Board when it first considers the potential labor agreement, and (2) his employment by the ECCFP District and membership in the Union are noted in the MOFP District's official records.

### *The Act*

The Act's conflict of interest provisions prohibit a public official from making, participating in making, or attempting to use the official's position to influence a governmental decision if it is reasonably foreseeable that the decision would have a material financial effect on one or more of the official's financial interests. (Sections 87100 and 87103.) An official's financial interests that

may give rise to a disqualifying conflict of interest under the Act are identified in Section 87103 and include all the following:

- An interest in any business in which the official has an investment worth \$2,000 or more (Section 87103(a)), or in which the official is a director, officer, partner, trustee, employee, or holds any position of management (Section 87103(d)).
- An interest in any real property in which the official has an interest worth \$2,000 or more. (Section 87103(b).)
- An interest in any source of income aggregating \$500 or more in the 12 months prior to the decision. (Section 87103(c).)
- An interest in any source of a gift or gifts aggregating \$520 or more in the 12 months prior to the decision. (Section 87103(e).)
- An interest in the official's personal finances and those of immediate family members.<sup>3</sup> (Section 87103.)

Because the Union is a nonprofit organization, the Union is not a "business entity," as defined in Section 82005. Therefore, Board Member Baitx does not have a business interest in the Union under Section 87103(a) or (d). Because the facts presented provide no indication that Board Member Baitx receives any income or gifts from the Union, Board Member Baitx does not have a source of income interest in the Union under Section 87103(c), or a gift interest in the Union under Section 87103(e). There is no indication that any real property interest of Board Member Baitx is at issue. Thus, based on the facts presented, the only financial interest of Board Member Baitx that may give rise to a disqualifying conflict of interest under the Act with respect to decisions relating to the potential labor agreement between the MOFP District and the Union is his interest in his personal finances and those of immediate family.

#### *Foreseeability and Materiality*

Regulation 18701(a) provides that a governmental decision's financial effect on an official's financial interest is presumed to be reasonably foreseeable if the official's interest is "explicitly involved" in the decision; an official's interest is "explicitly involved" if the interest is a named party in, or the subject of, the decision; and an interest is the "subject of a proceeding" if the decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the interest.

Regulation 18701(b) sets forth the foreseeability standard applicable to a decision's effect on an official's interest that is not explicitly involved in the decision and provides that the effect on such an interest is reasonably foreseeable if it "can be recognized as a realistic possibility and more than hypothetical or theoretical."

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<sup>3</sup> Section 82029 defines "immediate family" to mean the spouse and dependent children.

Regulation 18702.5(a) sets forth the materiality standard applicable to a decision's reasonably foreseeable financial effect on an official's personal finances, also referred to as a "personal financial effect," and provides that such an effect is material if "the decision may result in the official or the official's immediate family member receiving a financial benefit or loss of \$500 or more in any 12-month period due to the decision."

Under an exception to that materiality standard set forth in Regulation 18702.5(b)(1), however, a personal financial effect is not material if the decision would affect only the salary, per diem, or reimbursement for expenses the public official receives from a federal, state, or local government agency, unless the decision is to appoint, hire, fire, promote, demote, suspend without pay or otherwise take disciplinary action with financial sanction against the official, or to set a salary for the official that is different from salaries paid to other employees of the agency in the same job classification or position.

A separate exception to the materiality standard of Regulation 18702.5(a), set forth in Regulation 18702.5(b)(4), provides that a personal financial effect is not material if the decision would: "Establish or change the benefits or retirement plan of the official or the official's immediate family member, and the decision applies equally to all employees or retirees in the same bargaining unit or other representative group."

Although decisions relating to the potential labor agreement between the MOFP District and the Union may affect Board Member Baitx's salary and employment terms as a firefighter for the ECCFP District, the facts presented provide no indication that those decisions may result in his appointment, hiring, firing, promotion, suspension without pay, or being disciplined with financial sanction. Nor is there any indication that those decisions may result in the setting of his salary in a manner different from the salaries paid to other firefighters in the same job classification or position with the ECCFP District.

Furthermore, if a MOFP District decision relating to the potential labor agreement indirectly affects Board Member Baitx's benefits or retirement plan that he earns for serving as an ECCFP District firefighter, the personal financial effect of that decision would not be material so long as the decision equally affects all employees or retirees in the same bargaining unit or other representative group.

Therefore, the exceptions of Regulation 18702.5(b)(1) and (4) apply based on the facts presented. Accordingly, the Act's conflict of interest provisions do not prohibit Board Member Baitx from taking part in decisions relating to the potential labor agreement between the MOFP District and the Union because it is not reasonably foreseeable that those decisions would have a material financial effect on the Board Member's personal finances or those of immediate family.

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

Sincerely,

Dave Bainbridge  
General Counsel

*Matthew F. Christy*

By: Matthew F. Christy  
Counsel, Legal Division

MFC:dkv