



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
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March 8, 2021

Sonia R. Carvalho  
City Attorney  
City of Santa Ana  
20 Civic Center Plaza,  
P.O. Box 1988  
Santa Ana, California 92702

Re: Your Request for Advice  
**Our File No. A-20-136**

Dear Ms. Carvalho:

This letter responds to your request for advice regarding Government Code Section 1090, et seq.<sup>1</sup> Please note that we are only providing advice under Section 1090, not under other general conflict of interest prohibitions including 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 Orange 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

Does Section 1090 prohibit the City of Santa Ana ("City") from negotiating a side letter agreement for the retirement benefits of its City employee, Gerry Serrano related to his role as union president where Mr. Serrano has participated in the negotiations?

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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 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 Mr. Serrano is participating in his personal capacity and not his official capacity, his participation in negotiation of the side letter agreement regarding his retirement benefits does not give rise to a conflict of interest under Section 1090.

## FACTS AS PRESENTED BY REQUESTER

Gerry Serrano is a City employee and currently serves as the Police Officer's Association ("POA") President. There is a Memorandum of Understanding ("MOU") between the POA and the City that permits the POA President full time release from work to serve the union. The MOU provides for payment of "confidential pay" (roughly \$57,000 per year) to the POA President.<sup>2</sup> This pay is to be included in the POA President's retirement pay calculations, subject to CalPERS approval.

In conducting a routine review of the City's retirement and pay records, CalPERS questioned whether the confidential pay was eligible to be included within the POA President's retirement pay calculation and subsequently made a formal decision that the confidentiality pay is not reportable by the City for inclusion in retirement pay calculations. The City has appealed, and the appeal is pending.

After CalPERS questioned inclusion of the confidentiality pay, Mr. Serrano contacted City staff, the Mayor, and Council Members to discuss alternative ways for him to receive retirement credit or benefits to offset his potential loss. These conversations have been ongoing and resulted in raising various solutions, including a "side letter" agreement which would serve to modify the MOU and make him whole. The side letter will only affect the pay of Mr. Serrano, and he has indicated that the changes can be made such that they will not impact future POA Presidents, only him.

You have not identified any financial interests on the part of the City Council members, the Mayor, or other City staff which may be affected by the side letter agreement.

## 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.)

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<sup>2</sup> The POA members are all required to donate one of their personal holiday days back to the City on an annual basis to reimburse the City for the pay and benefits provided by the City to the POA President.

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 this prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Id.* at pp. 646-649.)

As a threshold matter, Section 1090 is not applicable if an individual is not acting in his or her official capacity in the making of a contract. Previous guidance pertaining to Section 1090 issued by the Attorney General is instructive here in determining whether Mr. Serrano is acting in an official role. ([80 Ops.Cal.Atty.Gen. 41](#).) In a matter where two firefighters developed a firefighting protective device in their personal capacities and sought to sell it to the City’s fire department, the Attorney General concluded:

...the two firefighters will be contracting with the city solely in their individual capacities and will not be involved officially with the making of the contract. They will have no input, as employees, into the city's decision whether to make the purchase. The decision will be made by the city council or city manager upon the recommendation of the fire chief. Under such circumstances, we conclude that they may sell their protective masks to the city without violating the “self-dealing” contractual prohibition of section 1090.

Similarly, here, Mr. Serrano in this instance is not acting in any official role on behalf of the POA or as a City employee, but rather, as an individual in the negotiation of his own personal employment contract. He will play no role in the actual decision as to whether and if a contract in the form of a “side letter” agreement is promulgated by the City – that decision lies with the City Council.

Further, the matter at hand can be distinguished from the seminal case of *Lexin v. Superior Court*. (47 Cal.4th 1050, 1151 (2010).) In *Lexin*, members of the San Diego Employees’ Retirement System Board (“SDCERS Board”) were accused of violating Section 1090 through their participation on the Board and recommendations made to the City which impacted pension benefits to City employees, including themselves. The Court noted, “...there is a concern that public officials negotiating with another entity for which they work will have divided loyalties and fail to ensure that the agency they represent (here, SDCERS) obtains the best deal from the entity that employs them (here, the City).” (*Id.* at 1084.) In the instant case, however, there are no such divided loyalties, or confusion about representation in the decision-making process. Mr. Serrano is not acting as a representative of his agency, plays no role as an officer in the decision-making, and is participating solely in regard to his own personal employment contract. The City is aware that Mr. Serrano is representing his own interests in this matter.

Accordingly, Section 1090 does not prohibit the City from making a side letter agreement regarding Mr. Serrano’s retirement benefits.

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

Sincerely,

Dave Bainbridge  
General Counsel

A handwritten signature in blue ink, appearing to read "EM Boyd". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

By: Erika M. Boyd  
Senior Counsel, Legal Division

EMB:aja