



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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February 26, 2021

Leticia Ramirez
City Attorney
City of Tracy
333 Civic Center Plaza
Tracy, CA 95376

Re: Your Request for Advice
Our File No. A-21-002

Dear Ms. Ramirez:

This letter responds to your request for advice regarding Government Code Section 1090, et seq.¹ Please note that we are only providing advice under Section 1090, not under other general conflict of interest prohibitions such as common law conflict of interest, including Public Contract Code.

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 San Joaquin 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 Mayor Pro Tem Vargas participate in consideration and approval of the personnel plan and related personnel agreement governing the terms and conditions for transferring the City's fire personnel to the South San Joaquin County Fire Authority (the "Authority")?
2. May Mayor Pro Tem Vargas participate in the consideration and approval of amendments to the Authority's joint powers agreement (the "JPA Agreement")?
3. May Mayor Pro Tem Vargas participate in approving the annual budget for the

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.

Authority after her husband becomes an employee of the Authority?²

CONCLUSIONS

1, 2 & 3. No. Mayor Pro Tem Vargas has a remote interest in contracts between the City and the Authority and may not participate in the decisions, but the City Council may approve the contracts provided that Mayor Pro Tem Vargas discloses her interest in the contracts to the City Council, the interest is noted in the City Council's official records, and she abstains from any participation in making or approving the contracts.

FACTS AS PRESENTED BY REQUESTER

The Authority was created in 2018 through a joint powers agreement between the City and the Tracy Rural Fire Protection District (the "District"). Under the terms of the JPA Agreement, and as authorized by the Joint Exercise of Powers Act, the Authority is an independent legal entity, separate from both the City and District. The Authority is governed by a four-person Board of Directors ("Board"), comprised of two members appointed by each of the City and District.

In addition to appointing two members of the Board, both the City and the District must annually approve the Authority's preliminary budget before the Board can adopt its budget. The annual cost of maintenance and operations for the Authority's fire protection services are shared by the City and the District based on the percentage of the Authority's daily-staffed positions that are located within a member agency's boundaries. Currently, the City funds a majority of the Authority's budget (72%) and the District funds the remaining portion.

At the time the Authority was created, it had no employees. Rather, the City provides all employees and employee services to the Authority, and the City is designated as the "Employer of Record" for the Authority's personnel. The City's employees provide services to the Authority and serve as the Authority's personnel, but the JPA Agreement provides that they should be treated in all respects as employees of the City as the "Employer of Record."

The JPA Agreement anticipates that in the future, these City employees will become employees of the Authority. The JPA Agreement creates a process whereby the Authority Fire Chief prepares a personnel plan, which establishes the terms of the transfer of employees from the City to the Authority, such as the allocation of pension liabilities and the effect on existing MOUs with labor bargaining groups. The personnel plan is required to be approved by the City and the Authority through the execution of a "personnel agreement."

The Authority has prepared a draft personnel plan that is currently being reviewed by the City. Approval from the City Council is required before the personnel plan and related personnel

² You have also asked whether Mayor Pro Tem Vargas may serve as a representative of the City on the Authority's Board of Directors after her husband becomes an employee of the Authority, or whether she may do so in the event the employee transition does not occur. While the Act may preclude Mayor Pro Tem Vargas from taking part in decisions that affect her financial interests and Section 1090 may restrict some contracts, neither preclude Mayor Pro Tem Vargas from serving as the City's representative. However, our reply is limited to the applicability of the Act to your questions. The Commission does not have the jurisdiction to advise on Section 1099 concerning incompatible offices.

agreement can become effective. Before the City Council takes action on the personnel plan, it must meet and confer with impacted bargaining units in accordance with the Meyers-Milias-Brown Act.

Mayor Pro Tem Vargas was first elected to the Tracy City Council in 2016. Mayor Pro Tem Vargas's husband is currently one of two Division Fire Chiefs in the City's Fire Department. He has been a City employee since 1999. He is a management employee and not part of a bargaining unit. As described above, members of the City Fire Department are employees of the City, but provide services to the Authority. Upon approval of the personnel plan and execution of the related personnel agreement, Mayor Pro Tem Vargas's husband will cease being a City employee and will become an employee of the Authority.

Under the terms of the draft personnel plan, City fire personnel will not experience significant changes to their existing salary or benefits upon becoming employees of the Authority. Implementation of the personnel plan, as drafted, will result in some minor changes, such as a new company providing health insurance benefits, but these changes will not impact existing employees' salaries or benefits in a substantive manner. Furthermore, the benefits enjoyed by Mayor Pro Tem Vargas's husband will not be changed in a manner different than any other City fire employee who will become an employee of the Authority.

The draft personnel plan also anticipates a slightly different classification plan for employees of the Authority compared to the current plan used by the City. However, the new classification plan will not change Mayor Pro Tem Vargas's husband's status as a management employee, a Division Fire Chief who reports directly to the Fire Chief. Similarly, the salary range for Mayor Pro Tem Vargas's husband's position will not be impacted.

Upon the transfer of employees to the Authority, the City will continue to have fiscal and operational oversight of the Authority through its representatives on the Authority's Board and approval of the City's budget, including the City's contribution to the Authority's budget. However, the Authority's Board will be responsible for approving employee compensation matters, including labor agreements and salary schedules.

ANALYSIS

Section 1090

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.) When an officer with a

proscribed financial interest is a member of the governing body of a public entity, the prohibition of Section 1090 also extends to the entire body, and it applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Id.* at pp. 646-649.) An official has an interest in the community and separate property income of his or her spouse. (*Nielsen v. Richards* (1925) 75 Cal.App. 680; *Thorpe v. Long Beach Community College Dist.* (2000) 83 Cal.App.4th 655; 89 Ops.Cal.Atty.Gen. 69 (2006).)

In this instance, it is not contested that Mayor Pro Tem Vargas is a public officer subject to the provisions of Section 1090 and that the aforementioned agreements involving the City and the Authority are contracts for purposes of Section 1090. Additionally, as a member of the Tracy City Council, Mayor Pro Tem Vargas is presumed to be involved in the making of all contracts by the City irrespective of whether she actually participates in the making of the contract. (*Thomson, supra*, at pp. 645, 649.) Thus, the determinative question is whether Mayor Pro Tem Vargas has an interest in the aforementioned agreements involving the City and the Authority, and, if so, whether her interest is a “remote interest” or a “noninterest” as defined in Sections 1091 and 1091.5.

The Legislature has created various statutory exceptions to Section 1090’s prohibition where the financial interest involved is deemed to be a “noninterest,” as defined in Section 1091.5, or a “remote interest,” as defined in Section 1091. A remote interest or noninterest exception that would apply to the officer if he or she directly held the financial interest at issue, also applies to an officer whose financial interest results from the officer’s community property interest in his or her spouse’s income. (See 81 Ops.Cal.Atty.Gen. 169 (1998); 78 Ops.Cal.Atty.Gen. 230 (1995).)

If a noninterest is present, the contract may be made without the officer’s abstention, and a noninterest generally does not require disclosure. (*City of Vernon v. Central Basin Mun. Water Dist.* (1999) 69 Cal.App.4th 508, 514-515.) If a remote interest is present, the contract may be made if: (1) the officer discloses the interest in the contract to his or her public agency; (2) that interest is noted in the agency’s official records; and (3) the officer abstains from any participation in the making of the contract. (Section 1091(a).)

Mayor Pro Tem Vargas’s husband works for and receives income from the City’s Fire Department. Because the spouse’s property is attributed to the official, exemptions that would be applicable if the official possessed the interest directly also apply to the spouse’s property. (See 78 Ops.Cal.Atty.Gen. 230 (1995); 81 Ops.Cal.Atty.Gen. 169 (1998).)

Of the statutory exceptions established for a remote interest and noninterest, two exceptions for contracts between government agencies are potentially applicable. First, under Section 1091(b)(13), an agency board member that receives salary, per diem, or reimbursement for expenses from another government entity has a remote interest in a contract between the two agencies. However, under Section 1091.5(a)(9), an officer or employee of a government agency receiving salary, per diem, or reimbursement for expenses from another government entity has a noninterest in a contract between the two agencies “unless the contract directly involves the department of the governmental 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.” (Section 1091.5(a)(9).)

In this case, Mayor Pro Tem Vargas's husband is employed as a Division Fire Chief with the City, so any contract pertaining to fire protection services between the City and the Authority, which will directly employ fire personnel currently employed by the City, necessarily involves the department that employs him. Accordingly, her interest in a contract between the City and the Authority is a remote interest under Section 1091(b)(13), and the Tracy City Council may approve the contract provided that Mayor Pro Tem Vargas discloses her interest in the contract to the City Council, the interest is noted in the City Council's official records, and she abstains from any participation in making or approving the contract. (Section 1091(a).)³

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

Sincerely,

Dave Bainbridge
General Counsel

Zachary W. Norton

By: Zachary W. Norton
Senior Counsel, Legal Division

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³ Because Mayor Pro Tem Vargas must recuse herself under Section 1090, it is unnecessary to consider the application of the Act to the questions presented. However, we caution that the Act also requires that she leave the room during the duration of the discussion and decision. (Regulation 18707.)