



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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March 9, 2021

Hilda Cantu Montoy
Montoy Law Corporation
City of Kerman
2440 Tulare St, Suite 410
Fresno, CA 93721

Re: Your Request for Advice
Our File No. A-21-022

Dear Ms. Montoy:

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 Fresno 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 Kerman from entering an agreement with the Kerman Public Safety Employees Association (the "Union") where a member of the City Council is engaged to a police officer who is Vice President of the Union?

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

Under Section 1090, Councilmember Coleman would have a financial interest in such agreement and may not participate in the discussions or decision. However, the rule of necessity exception applies, and the City and the Union may enter into the agreement so long as Councilmember Coleman does not take part in any decisions involving the agreement. Additionally, because the remedy in this situation under the Act would be the same, we do not analyze the potential conflicts of interest under the Act.

FACTS AS PRESENTED BY REQUESTER

You represent the City of Kerman as City Attorney. The City will be commencing labor negotiations with the Kerman Public Safety Employees Association (“Union”) pursuant to the Meyers-Milias-Brown Act. The current contract (“MOU”) with the Union will expire on June 30, 2021. The City is obligated under the Meyers-Milias-Brown Act to negotiate on the expired MOU.

Councilmember Jennifer Coleman was elected to the City Council in the November 2020 election. She is engaged to Miguel Antuna, a police officer who is Vice-President of the Union. They plan to marry at the end of 2021. Councilmember Coleman and Officer Antuna live together in a home owned by him. He purchased the home before she started residing in the home. Currently, she pays no rent, and he pays for the utilities. Their finances are not combined, and they maintain separate bank accounts.

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. City of 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.) Finally, when Section 1090 applies to one member of a governing body of a public entity, the prohibition cannot be avoided by having the interested board member abstain. Instead, the entire governing body is precluded from entering into the contract. (*Thomson, supra*, at pp. 647- 649; *Stigall, supra*, at p. 569; 86 Ops.Cal.Atty.Gen. 138, 139 (2003); 70 Ops.Cal.Atty.Gen. 45, 48 (1987).)

Here, the first issue is whether Councilmember Coleman would have a financial interest, for purposes of Section 1090, in a contract that financially benefits her fiancé. To begin, a member of a board or commission always has a financial interest in a 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

[their] spouse.” (89 Ops.Cal.Atty.Gen. 258, 264 (2006).) In addition, while Section 1090 does not define the term “financial interest,” the Attorney General recently summarized its meaning:

Neither Government Code section 1090 nor its broader statutory scheme (§§ 1090-1097) specifically defines the term “financially interested.” Instead, in view of section 1090’s purposes, courts have given the term a broad reading. As explained in *People v. Gnass*, “section 1090 cannot be interpreted in a restricted or technical manner.” (*People v. Gnass* (2002) 101 Cal.App.4th 1271, 1298.) Rather, section 1090 is “concerned with any interest, other than perhaps a remote or minimal interest, which would prevent the officials involved from exercising absolute loyalty and undivided allegiance to the best interests of the city.” (*Stigall, supra*, 58 Cal.2d at p. 569.) Thus, the determination whether an official is “financially interested” in a contract does not depend on the certainty of financial gain, nor on the good intentions of the official, nor on the benefit the contract may confer on the agency. Rather, the question is whether the financial interest has even the potential to compromise the official’s duty to the public because of personal financial considerations. “Government Code section 1090 applies when a public official has a direct financial interest in a contract. And [e]ven when a public official’s financial interest is indirect, section 1090 will still apply unless the interest is too remote and speculative. [Citations.]”

(98 Ops.Cal.Atty.Gen. 102, 104 (2015).) Accordingly, Section 1090 is “concerned with ferreting out any financial conflicts of interest, other than remote or minimal ones, that might impair public officials from discharging their fiduciary duties with undivided loyalty and allegiance to the public entities they are obligated to serve.” (*Lexin v. Super. Ct.* (2010) 47 Cal.4th 1050, 1097.)

In the present situation, Councilmember Coleman and her fiancé are engaged to be married at the end of 2021. She currently lives rent free with him in the home he owns. He pays for all of the utilities. While not yet married, given these specific facts and the requirement that we must apply Section 1090 broadly to also “strike at the appearance of impropriety,” we find that Councilmember Coleman has a financial interest in the future agreement between the City and the Union. Because she is a member of the City Council, Councilmember Coleman is conclusively presumed to be involved in the making of any agreement within the City’s jurisdiction. Therefore, an agreement between the City and the Union is prohibited by Section 1090 unless an exception applies.

In limited cases, the “rule of necessity” exception has been applied to allow the making of a agreement that Section 1090 would otherwise prohibit. (*Eldridge v. Sierra View Hospital Dist.* (1990) 224 Cal.App.3d 311, 322.) The rule has been applied where public policy concerns authorize the agreement and “ensures that essential government functions are performed even where a conflict of interest exists.” (*Ibid.*, See also 69 Ops.Cal.Atty.Gen. 102, 109 (1986); (88 Ops.Cal.Atty.Gen. 106, 110 (2005).) “The rule of necessity permits a government body to act to

carry out its essential functions if no other entity is competent to do so ...” (*Lexin, supra*, at p. 1097.)

Under this rule, an agreement can be executed even though it would otherwise violate the terms of Section 1090. The “rule of necessity” has been applied in at least two specific types of situations: where the agreement is for essential services and no source other than the one that triggers the conflict is available; and where the official or board is the only one authorized to act. (69 Ops.Cal.Atty.Gen. 102,109 (1986).)

For instance, the “rule of necessity” has been applied to allow a school board to enter into a memorandum of understanding with a teachers’ association even when a board member is married to a tenured teacher and would have a financial interest in the agreement. (69 Ops.Cal.Atty.Gen. 102 (1986).) Similarly, a community college board was allowed under the rule to negotiate with its faculty for salary and benefits even though a board member was a retired faculty member whose health benefits were tied to current faculty benefits. (89 Ops.Cal.Atty.Gen. 217 (2006).)

Here, similar to the matters above, the City must be permitted to negotiate and contract with the Union in order to properly carry out its essential functions. Indeed, it is legally obligated under the Meyers-Milias-Brown Act to negotiate on the expired MOU with the Union. Accordingly, we find that the rule of necessity applies and permits the City to enter an agreement with the Union. Councilmember Coleman, however, must abstain from any participation in the decision.²

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

Sincerely,

Dave Bainbridge
General Counsel

By: *Jack Woodside*
Jack Woodside
Senior Counsel, Legal Division

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² When the rule of necessity applies to a member of a multi-member board, the Attorney General’s Office has determined that the interested board member must abstain from any participation in the decision. (See 89 Ops.Cal.Atty.Gen. 217 (2006).) In addition, note that participation in the making of a contract is defined broadly as any act involving preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitation for bids. (*Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237.)