



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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March 30, 2022

Gary S. Winuk
Kaufman Legal Group
621 Capitol Mall, Suite 1900
Sacramento, CA 95814

Re: Your Request for Advice
Our File No. A-22-016

Dear Mr. Winuk:

This letter responds to your request for advice regarding the Act's conflict of interest provisions and Government Code Section 1090, et seq.¹ Please note that we are only providing advice under the Act and not under other general conflict of interest prohibitions such as common law conflict of interest. Moreover, as you have not identified specific contracts before San Diego County, we cannot provide advice under Section 1090 at this time.²

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 Diego 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).)

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 18109 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.

² We note that you have also sought advice regarding Supervisor Fletcher's involvement in other contracts involving local labor unions. However, absent information regarding a specific contract and the parties involved we are unable to evaluate Supervisor Fletcher's involvement in these contracts under the Act or Section 1090. Accordingly, this letter does not address these contacts. We recommend you seek further advice once information about the actual contracts is available.

QUESTION

Does the Act prohibit Supervisor Nathan Fletcher from taking part in upcoming decisions regarding the prohibition on the use of project labor agreements on County projects given the local labor unions are affiliated with the California Labor Federation, his spouse's employer?

CONCLUSION

Yes. Supervisor Fletcher is disqualified under the Act from taking part in Board decisions concerning the use of project labor agreements because of the impermissible nexus between the decisions and income his spouse will receive from the California Labor Federation.

FACTS AS PRESENTED BY REQUESTER

You represent Nathan Fletcher, an elected member of the San Diego County Board of Supervisors. Supervisor Fletcher's spouse, Lorena Gonzalez Fletcher, is the incoming Executive Secretary-Treasurer of the California Labor Federation, AFL-CIO (the "Federation"). In that position, she will be the Federation's Chief Officer.³ The Federation is governed by the Executive Secretary-Treasurer and a President. In addition, 47 Vice-Presidents representing affiliated unions and central labor councils are elected through a biennial convention into the Executive Council of the Federation.

The Federation is a Statewide nonprofit organization⁴ dedicated to the goal of promoting and defending the interests of working people and their families for the betterment of California communities. It consists of 1,200 affiliated unions, representing 2.1 million union members in manufacturing, retail, construction, hospitality, public sector, health care, entertainment and other industries. Its affiliates are actively engaged in every aspect of California's economy and government and voluntarily join together to help working people build better lives and futures for their families. (See <https://calaborfed.org>.)

The AFL-CIO is made up of different State Federations and Central Labor Councils ("CLC"). These entities operate independently from one another, are individually governed, and maintain tiered jurisdictions. While the National AFL-CIO has the ability to become the trustee of a State Federation or a CLC, or even pull their charter, the State Federation has no similar control over the CLCs within their states. The Federation focuses solely on statewide legislation and political activity. This is in contrast to the San Diego & Imperial Counties CLC, which focus on local legislation and political activity within San Diego and Imperial Counties. The Federation does not weigh in on legislation or actions at any local level in the State. It does not participate in the negotiation of local labor agreements or policies developed by local governments regarding project labor agreements.

³ She will replace Art Pulaski who helped grow the California labor movement by 500,000 members. (See <https://calaborfed.org>.)

⁴ The Federation is a nonprofit tax-exempt entity pursuant to Section 501(c)(5) of the Internal Revenue Code.

Under the structure of the AFL-CIO, the Federation derives its income from a per-capita fee of 70 cents a month per member for affiliated unions. The Executive Secretary-Treasurer of the Federation has a salary that is set every four years in the Federation's constitution, which is ratified by thousands of delegates from throughout the State at the Federation's annual convention. It is automatically set at the rate as it exists at the time of the convention. The Executive Secretary-Treasurer's salary may only be increased or decreased by the same proportion as other staff salaries negotiated with the union representing the Federation's staff, according to the economic conditions of the organization generally, and may not be individually negotiated or adjusted.

The San Diego County Board of Supervisors has several upcoming contract decisions that involve local labor unions and their members. Some of those upcoming decisions involve the negotiation and ratification of labor contracts between the County and local unions that are affiliates of the Federation. In addition, the Board of Supervisors may engage in policy discussions relating to the use of project labor agreements ("PLAs")⁵ on County construction projects, which are currently prohibited under the County Charter. A decision by the Board on this issue will not involve specific labor unions or specific PLAs but will instead relate to project labor agreements in County construction projects generally. However, the Board of Supervisors may consider approval of specific PLAs in the future.

Consistent with its role of involvement only in Statewide issues, the Federation will not have any direct involvement in either the labor contract or project labor agreement decisions coming before the County.

ANALYSIS

The Act's conflict of interest provisions prohibits a public official from taking part in 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 distinguishable from the decision's effect on the public generally. (Sections 87100 and 87103.) An official's financial interests, which may give rise to a disqualifying conflict of interest under the Act, are identified in Section 87103. The following interests are relevant to your situation:

- An interest in a business entity⁶ in which the official has a direct or indirect investment of \$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).)

⁵ PLAs are typically described as a pre-hire collective bargaining agreement with one or more labor organizations that establishes terms and conditions of employment for a specific construction project or projects. (See *Associated Builders & Contractors, Inc. v. San Francisco Airports Com.*, (1999) 21 Cal. 4th 352, 359; *Associated General Contractors of America v. San Diego Unified School Dist.* (2011) 195 Cal. App. 4th 748, 753-754; see also *Associated Builders & Contractors v. Contra Costa Water Dist.*, (1995) 37 Cal.App.4th 466, 468 [PLA covering project negotiated between union (AFL-CIO) and district, "in essence, provided that only contractors and subcontractors bound to hire union labor would be eligible to bid or contract for construction of the project"]; *Montoy* Advice Letter, No. I-19-209 ["CLC would normally advocate for PLAs in all of its jurisdictions"].)

⁶ Section 82005 defines a "business entity" as any organization or enterprise operated for profit, including but not limited to a proprietorship, partnership, firm, business trust, joint venture, syndicate, corporation or association.

- An interest in a source of income to the official, including promised income, which aggregates to \$500 or more within 12 months prior to the decision. (Section 87103(c).)
- The official's interest in his or her personal finances and those of immediate family members. (Section 87103.)⁷

According to the facts, Supervisor Fletcher's spouse will be the Executive Secretary-Treasurer of the Federation, a nonprofit organization. A public official's "income" for conflict of interest purposes includes the official's community property interest in the income of their spouse. (Section 82030(a).) Therefore, assuming his spouse will have received \$1,000 or more from the Federation within 12 months prior to making a relevant governmental decision, the Federation will be a source of income to him. He will not, however, have a business interest in the Federation because, as a nonprofit organization, it is not a "business entity" as defined by the Act. (Section 82005.) Finally, an official always has an interest in his or her personal finances and those of immediate family members. (See Section 87103.)

Foreseeability

Regulation 18701(a) provides the applicable standard for determining the foreseeability of a financial effect on an economic interest explicitly involved in the governmental decision. It states, "[a] financial effect on a financial interest is presumed to be reasonably foreseeable if the financial interest is a named party in, or the subject of, a governmental decision before the official or the official's agency. A financial 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 financial interest, and includes any governmental decision affecting a real property financial interest as described in Regulation 18702.2(a)(1)-(6)."

Where an official's economic interest is not explicitly involved in the governmental decision, the applicable standard for determining the foreseeability of a financial effect on the economic interest is found in Regulation 18701(b). That regulation provides, "[a] financial effect need not be likely to be considered reasonably foreseeable. In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official's control, it is not reasonably foreseeable."

Materiality

Different standards apply to determine whether a reasonably foreseeable financial effect on an interest will be material depending on the nature of the interest.

In the present situation, the reasonably foreseeable financial effect of a governmental decision on Supervisor Fletcher's interest in the Federation as a source of income will be material if

⁷ Under Regulation 18702.5(a), "[a] governmental decision's reasonably foreseeable financial effect on a public official's financial interest in personal finances or those of immediate family, also referred to as a "personal financial 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."

the Federation “is a named party in, or the subject of, the decision including a claimant, applicant, respondent, or contracting party.” (Regulation 18702.3(a)(1).) There are no facts to suggest the Federation itself will be a named party in, or the subject of, any future Board decisions related to the current prohibition on PLAs on County projects.

In addition, the financial effect will be material when a decision may: 1) result in an increase or decrease of the Federation’s annual gross receipts, or the value of its assets or liabilities, in an amount equal to or greater than \$1,000,000, or five percent of its annual gross receipts and the increase or decrease is equal to or greater than \$10,000 (Regulation 18702.3(a)(3)(A)); or 2) may cause it to incur or avoid additional expenses or to reduce or eliminate expenses in an amount equal to or more than \$250,000, or one percent of its annual gross receipts and the change in expenses is equal to or greater than \$2,500 (Regulation 18702.2(a)(3)(B)). However, considering the Federation’s goal of promoting and defending the goals of its affiliated unions and union members, it is unnecessary to consider whether the effect on the Federation gross receipts, asset or liabilities, or expenses will meet these thresholds.

As pertinent to the Federation’s underlying goals, Regulation 18702.3(b) sets forth the “nexus test,” an alternative standard for determining the materiality of an official’s financial interest in a source of income. Under the nexus test, any reasonably foreseeable financial effect on a source of income to a public official or the official’s spouse is material if the decision will achieve, defeat, aid, or hinder a purpose or goal of the source and the official or the official’s spouse receives or is promised the income for achieving the purpose or goal. (Regulation 18702.3(b).)

The rationale for the nexus test is that, when an employee earns a salary to accomplish a purpose that may be advanced by what he or she does as a public official, we presume that the private employer is benefiting from the actions of the employee in his or her official capacity. (*Garza* Advice Letter, No. A-17-207; *Tran* Advice Letter, No. A-16-024; *Maltbie* Advice Letter, No. A-15-243.) Typically, a “nexus” is found in situations where the official is also a high-level employee with direct influence and control over their employer’s management or policy decisions. (*Tran* Advice Letter, *supra*; *Moser* Advice Letter, No. A-03-147; *Low* Advice Letter, No. A-99-305.)

Here, as the incoming Chief Officer of the Federation, Supervisor Fletcher’s spouse will receive income to assist the Federation, which consists of 1,200 affiliated unions, in promoting and defending the interests of the union members and their families. County decisions to allow the use of PLAs on County construction projects, which are currently prohibited under the County Charter, would certainly appear to aid in that express goal of the Federation by paving the way for County contracts utilizing union labor. (See, e.g., *Montoy* Advice Letter, No. I-19-209, [nexus test would apply to disqualify councilmember, a salaried employee of a CLC that advocates on behalf of affiliated unions (including for PLA’s in all relevant jurisdictions) and that pay membership dues, from taking part in decisions involving PLAs because “the very nature of the CLC and (the councilmember’s) work for the organization appears to be closely tied to advancing the interests of affiliated unions and achieving beneficial working conditions for them”].)

You cite the *Rosenburg* Advice Letter, No. A-17-209 and the *Cavanaugh* Advice Letter, No. I-17-166 to support a finding of no nexus in the present matter because you allege the decisions regarding the use of PLAs on County construction projects, like the decisions at issue in those

matters, will have no financial effect on the Federation. In *Rosenburg*, the question was whether the Act prohibited the City of South San Francisco's Vice Mayor, who served as the CEO for the Chamber of Commerce, from taking part in decisions related to a planning application by a company that was a member of the Chamber of Commerce. The decisions did not involve any contribution to, or connection with, the Chamber. Therefore, the nexus test was determined to be inapplicable where the City decisions would only have a financial effect on the member company, not the Chamber.

Similarly, in the *Cavanaugh* Advice Letter, *supra*, the question was generally whether the Act prohibited the City of Paramount Mayor, who was the Executive Director of the Chamber of Commerce, from taking part in decisions involving businesses that were members of the Chamber. With respect to the nexus test, the letter concluded that it would probably be inapplicable because a decision affecting a member of the Chamber would not have a financial effect on the Chamber unless, for example, at the time of the decision the Mayor was soliciting the business to become a member or sponsor of the Chamber (and the business had not yet responded) or the business had implied the outcome of the decision may influence its response.

We find those letters unpersuasive. Unlike the present situation, the relevant governmental decisions in *Rosenburg* and *Cavanaugh* relating to members of the Chamber were independent of, and had no connection to, their membership in the Chamber – and it was therefore not reasonably foreseeable that a decision affecting only a member would have any financial effect on the Chamber. Here, however, County decisions concerning the current prohibition on PLAs on County construction are very much relevant to the number of union members that will be necessary for County projects and a potential increase in the Federation's operational funds received from these members. For example, if the County allows the use of PLAs and there is a resulting increase in dues-paying union members, the Federation will then collect more dues as a direct result of the decision. Accordingly, as it is reasonably foreseeable the decision may increase the number of dues paying members within the County, it is reasonably foreseeable that the decision will have a material effect on the Federation, which receives its operating funds based on the number of members under the nexus standard.⁸

Accordingly, Supervisor Fletcher is disqualified under the Act from taking part in Board decisions concerning the use of PLAs because of the nexus between the decisions and income his spouse will receive from the Federation.

⁸ Note that the materiality thresholds set forth in Regulation 18702.3(a)(3)(A)&(B) do not apply when determining materiality under the nexus test.

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

JW:dkv