



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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May 9, 2023

Barbara Thompson
County Counsel
County of San Benito
481 Fourth Street, 2nd Floor
Hollister CA 95023

Re: Your Request for Advice
Our File No. A-23-004

Dear Ms. Thompson:

This letter is in response to your request for advice regarding conflict-of-interest provisions of the Political Reform Act¹ and Section 1090, et seq. 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. 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 Benito 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 the Act or Section 1090 prohibit Supervisor Sotelo from participating in a Board decision to lend money to another government entity where her spouse is employed?

CONCLUSION

No. Under the Act, Supervisor Sotelo's spouse's salary from a governmental entity is not considered income and she is not disqualified from decisions involving the governmental entity barring any other economic interest in the decision. Under Section 1090, Supervisor Sotelo's interest in her spouse's employment with a public agency is a noninterest under Section 1091.5(a).

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 18104 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.

Thus, Supervisor Sotelo is not prohibited from participating in the County's decision to lend money to the government entity where her spouse is employed.

FACTS AS PRESENTED BY REQUESTER

Supervisor Mindy Sotelo is one of five supervisors on the Board for the County of San Benito who was elected in the fall of 2022. In San Benito County, the local hospital (Hazel Hawkins) is operated by the San Benito Health Care District (the District). Supervisor Sotelo's spouse is employed by the District with a salary comprising over 55% of the household income. Her spouse is a stationary engineer for the hospital, he does not work in management and is not involved with efforts by the District to lobby or influence the County's decisions.

The District's governing board recently declared a fiscal emergency for the District, authorizing it to file for bankruptcy. In addition, the District recently issued Worker Adjustment and Retraining Notification Act (WARN) notices, a federally required notice that large employers must send their employees 60 days before a possible closure. Absent financial support, it is a realistic possibility that the District will declare bankruptcy and that the local hospital, where Supervisor Sotelo's spouse works, along with other District health care service facilities, will be closed, and that the District's employees would be released.

The District recently approached the County of San Benito and requested a loan from the County to help serve as a bridge for funding while the District pursues restructuring/reorganization and seeks additional financial support to enable its operations to continue. A loan would likely require a contract that sets forth terms for repayment.

In an agenda item separate from actual appropriation to the hospital, the Board plans to vote to move general fund reserve dollars to the general fund, but without those funds being appropriated to the hospital in that agenda item. The findings to move funds from reserves would reference the need to move funds from the reserve to the general fund as a result of the potential hospital closure and potential need to use the money either to prevent the closure or as a result of such closure. The actual use of those funds would not be specified. The funds transferred could be used for a loan or for other purposes such as addressing impacts of the closure. One such impact could be increased ambulance transportation costs if the hospital closes. A transfer from general fund reserves would require a 4/5 vote of the Board.

The Board plans to make decisions for the benefit of the County, which may indirectly benefit the hospital, such as hiring a consultant or legal counsel to provide expert advice in this matter.

ANALYSIS

A. The Act.

Under Section 87100 of the Act, "[n]o public official at any level of state or local government shall make, participate in making or in any way attempt to use the public official's position to influence a governmental decision in which the official knows or has reason to know the official has a financial interest." "A public official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material

financial effect, distinguishable from its effect on the public generally, on the official, a member of the official's immediate family," or on certain specified economic interests. (Section 87103.)

Among those specified economic interests are:

- Any source of income, aggregating \$500 or more in value provided or promised to, received by, the public official within 12 months prior to the time when the decision is made. (Section 87103(c).)
- An interest in the official's personal finances and those of the official's immediate family. (Section 87103.)

Under the Act, "income" includes any community property interest in the income of a spouse. (Section 82020(a).) However, the Act's definition of income expressly excludes "salary and reimbursement for expenses and per diem received from state, local or federal government agency" (Section 82030(b)(2).) Regulation 18232(a) states that, for purposes of Section 82030(b)(2):

"Salary" from a state, local, or federal government agency to a public official means any and all payments made by a government agency to a public official, or accrued to the benefit of a public official, as consideration for the public official's services to the government agency. Such payments include wages, fees paid to public officials as "consultants,"... pension benefits, health and other insurance coverage, rights to compensated vacation and leave time, free or discounted transportation, payment or indemnification of legal defense costs, and similar benefits.

Here, the facts provided indicate that Supervisor Sotelo's spouse is employed by and receives a salary from the District. Thus, her spouse's salary from the District does not constitute income under the Act and the salary does not result in disqualification from any decision involving the District barring any other economic interest.

Notably, Supervisor Sotelo also has a financial interest in her personal finances under the Act and those of her immediate family. (Section 87103; Regulation 18702.5) However, Regulation 18702(b)(1) provides that a financial effect on the official's personal finances including the official's immediate family is not material if the decision at issue would affect only the salary that the official or member of the official's immediate family receives from a state government agency:

... unless the decision is to appoint (other than an appointing decision permitted under subdivision (b)(2) and (3)), hire, fire, promote, demote, suspend without pay or otherwise take disciplinary action with financial sanction against the official or a member of the official's immediate family, or to set a salary for the official or a member of the official's immediate family which is different from salaries paid to other employees of the government agency in the same job classification or position, or when the member of the public official's immediate family member is the only person in the job classification or position.

Based on the facts provided here, the decision at issue is not a decision with a material financial effect on Supervisor Sotelo's personal finances under Regulation 18702(b)(1). Therefore, Supervisor Sotelo does not have a disqualifying conflict of interest in the decisions identified and

the Act does not prohibit Supervisor Sotelo from taking part in the County's decision to lend money to the District barring any other interest.

B. Section 1090.

Under Section 1090, county officers "shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are a member." 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.) 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, 646-649.) When Section 1090 is applicable to one member of a governing body of a public entity, the prohibition cannot be avoided by having the interested board member abstain; the entire governing body is precluded from entering into the contract. (*Id.* at pp. 647-649.)

In the present case, the question is whether Supervisor Sotelo's spouse's employment with the District constitutes a conflict of interest under Section 1090 that prohibits a loan agreement between the County and the District. Section 1091.5(a) provides that an officer shall not be deemed to be interested in a contract if the official's interest is:

- (6) That of a spouse of an officer or employee of a public agency in his or her spouse's employment or officeholding if his or her spouse's employment or officeholding has existed for at least one year prior to his or her election or appointment.

Supervisor Sotelo's spouse's employment with the District commenced more than a year before her election to the County Board of Supervisors in the fall of 2022.² Accordingly, Section 1090 does not prohibit Supervisor Sotelo or the County from participating in the County's decision to loan money to the District because the noninterest exception set forth in Section 1091.5(a)(6) applies.

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

Sincerely,

Dave Bainbridge
General Counsel

/ s/ John M. Feser Jr.

By: John M. Feser Jr.
Senior Counsel, Legal Division

² While the exception would not apply if the contract decisions created some new or different employment for Supervisor Sotelo's spouse (see e.g., 87 Ops.Cal.Atty.Gen. 23, 27 (2004)), that is not the case here.