



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
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November 22, 2016

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Re: Your Request for Advice  
**Our File No. A-16- 213, A-16-218, and A-16-220**

Dear Messrs. Jenkins, Lehr, and Klinkner:

This letter responds to your requests for advice regarding Government Code Section 1090, *et seq.*<sup>1</sup> Please note that we do not advise on other conflict of interest laws, including Public Contract Code or common law conflicts of interest. We are also 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.

In regard to our advice on Section 1090, we are required to forward your request and all pertinent facts relating to the request to the Attorney General's Office and the Los Angeles 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).)

Since the three requests for advice concerned the same position at the same agency and similar facts we have merged our response into a single letter.

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<sup>1</sup> Government Code Sections 1090 through 1097.5. 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.

## QUESTIONS

1. Does Section 1090 prohibit the Southern California Public Power Authority from hiring Michael Webster, a former Alternate Board Director, as its Executive Director?
2. Does Section 1090 prohibit the Southern California Public Power Authority from hiring Jaroslaw (Yarek) Lehr, an Alternate Board Director, as its Executive Director?
3. Does Section 1090 prohibit the Southern California Public Power Authority from hiring Eric R. Klinkner, an Alternate Board Director, as its Executive Director?

## CONCLUSIONS

1. No. Under Section 1090, as a former Alternate Board Director who did not participate in any discussions concerning recruitment, or the terms and conditions of employment, of a new Executive Director, Mr. Webster is not prohibited from taking the position.
2. No. Under Section 1090, as an Alternate Board Director who did not participate in any discussions concerning recruitment, or the terms and conditions of employment, of a new Executive Director, Mr. Lehr is not prohibited from taking the position.
3. Mr. Klinkner is not conclusively presumed to have participated in the making of the contract as an Alternate Board Director. However, because Mr. Klinkner had an opportunity for very limited participation in preliminary discussions, under which the contract would later be executed, we cannot conclude that he participated in the making of the employment agreement, and leave it to the SCPPA and Mr. Klinkner to determine whether such participation prohibits him from taking the Executive Director position.

## FACTS

Former Alternate Board Director Michael Webster, and two current Alternate Directors, Jaroslaw (Yarek) Lehr and Eric R. Klinkner, of the Southern California Public Power Authority ("SCPPA") request advice as to whether Section 1090 prohibits them from accepting a position as Executive Director of the SCPPA or whether Section 1090 prohibits the Southern California Public Power Authority from hiring the three requestors.<sup>2</sup> The SCPPA is a joint powers agency comprised of eleven municipal utilities, including those of Azusa, Los Angeles, and Pasadena, as well as one irrigation district (the "Members"). Together they deliver electricity to over 2 million customers in southern California over an area of approximately 7,000 square miles. Formed in 1980, the SCPPA was created for the purpose of providing joint financing, construction and operation of transmission and generation projects.

The SCPPA is in the process of hiring a new Executive Director. On May 19, 2016, the current Executive Director announced that he would retire at the end of 2016. On June 7, 2016, the

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<sup>2</sup> Attorney Michael Jenkins submitted the request on behalf of former Alternate Board Director Michael Webster.

SCPPA Board issued a Request for Proposals in order to secure an executive search firm to conduct the search for candidates for the Executive Director position. Subsequently, on July 21, 2016, the SCPPA Board authorized the current Executive Director to hire an executive search firm to recruit a new Executive Director.

The SCPPA is governed by a Board of Directors consisting of one Director representing each Member. Alternate Directors only participate in the Board meetings when the regular Director is absent. Article III, Section 13 of the SCPPA By-Laws provides for Alternate Directors, as follows:

Alternate Director(s). The chief executive officer of the electric Utility of each Member may designate one or more Alternate Directors to serve in his or her individual capacity as a member of the Board of Directors when the chief executive officer or his or her designee is absent or not able to act at a meeting of the Board of Directors, provided however, that only one Alternate Director may vote on a matter. Such Alternate Director may exercise and shall be vested with all powers of a member of the Board of Directors, when acting in such capacity.

*Michael Webster*

Michael Webster is employed by the City of Los Angeles Department of Water and Power as Executive Director - Power Systems, Engineering and Technical Services. He joined the SCPPA Board of Directors as an Alternate Director from the City of Los Angeles Department of Water and Power in December 2014, and served until he was officially removed as an Alternate Director on June 3, 2016.

In Mr. Webster's capacity as an Alternate Director, he substituted for the regular Director at seven Board meetings; most recently at the May 2016 meeting. According to the facts presented, at no time during his tenure as an Alternate Director did Mr. Webster participate in any Board discussions concerning recruitment of a new Executive Director or the terms and conditions of employment of a new Executive Director. The subject of recruitment of a new Executive Director was not on the agenda of any of these meetings.

In addition, Mr. Webster's attorney stated in a subsequent email that Mr. Webster received an email, sent by Fred Mason on May 20, 2016, regarding the job description for the Executive Director position. Mr. Webster responded to this email with the request that he not be included in these emails; and he did not offer any comments related to the job description.

*Jaroslav (Yarek) Lehr*

Jaroslav Lehr is employed by the City of Azusa Light & Water as Assistant Director of Resource Management. He joined the SCPPA Board of Directors as an Alternate Director from the City of Azusa Light & Water in 2010.

In Mr. Lehr's capacity as an Alternate Director, he substituted for the regular Director at six Board meetings; most recently at the February 2016 meeting. According to the facts presented, at

no time during his tenure as an Alternate Director did he participate in any Board discussion concerning recruitment of a new Executive Director or the terms and conditions of employment of a new Executive Director. The subject of recruitment of a new Executive Director was not on the agenda of any of these meetings.

In addition, he stated in a subsequent email that he did not receive an email regarding the job description for the Executive Director position, and did not communicate with the SCPPA regarding the Executive Director job description.

*Eric R. Klinkner*

Eric R. Klinkner is employed by Pasadena Water and Power, serving as Chief Deputy General Manager for over ten years. Mr. Klinkner also served as the appointed Pasadena Water and Power Interim General Manager from July, 2015 through January, 2016, during which time he represented Pasadena Water and Power on the SCPPA Board.

Mr. Klinkner was present and voted as a regular Director at all monthly meetings from August, 2015 through January, 2016, and resumed his position as an Alternate Director in February 2016. This was prior to the time the current Executive Director announced his retirement, and the subject of recruitment of a new Executive Director was not on the agenda of any of these meetings. Mr. Klinkner was present and voted as an Alternate Director at the August 2016 meeting. According to the facts presented, at no time during Mr. Klinkner's tenure as an Alternate Director did he participate in any Board discussion concerning recruitment of a new Executive Director. The subject of recruitment of a new Executive Director was not on the agenda of any of these meetings. However, at the September, 2014 meeting, Mr. Klinkner was present as a voting member when the SCPPA Board authorized the executive director to execute a professional services contract for a compensation study for executive-level positions using data from publicly-owned utilities and JPAs comparable to the SCPPA.

In addition, Mr. Klinkner has indicated that he did receive an email sent on May 20, 2016, regarding the job description for the Executive Director position. Mr. Klinkner responded to this email, providing minor comments.

## ANALYSIS

Section 1090 provides, in part, that "[m]embers of the Legislature, state, county, district, judicial district, and city officers or employees 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 members."

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

**Step One: Is there a public officer who is subject to the provisions of Section 1090?**

Section 1090 applies to virtually all state and local officers, employees, and multi-member bodies, whether elected or appointed. Alternate Board Directors are public officers of a local government agency and are subject to Section 1090. (See e.g., *Thomson v. Call* (1985) 38 Cal.3d 633.)

**Step Two: Does the decision at issue involve a contract?**

To determine whether a contract is involved in the decision, one may look to general principles of contract law (84 Ops.Cal.Atty.Gen. 34, 36 (2001);<sup>3</sup> 78 Ops.Cal.Atty.Gen. 230, 234 (1995)). while keeping in mind that “specific rules applicable to sections 1090 and 1097 require that we view the transactions in a broad manner and avoid narrow and technical definitions of ‘contract.’” (*People v. Honig, supra*, at p. 351 citing *Stigall v. City of Taft, supra*, at pp. 569, 571.)

Here, a proposed employment agreement with the SCPPA is at issue. Thus, the decision involves a contract.

**Step Three: Are public officers making or participating in making a contract?**

Generally, two tests exist to determine if a public official has participated in the making of a contract.

- Where an official is a member of a board or commission that has the power to execute the contract, he or she is conclusively presumed to be involved in the making of his or her agency’s contracts irrespective of whether he or she actually participates in the making of the contract. (*Thomson v. Call* (1985) 38 Cal.3d 633, 645 & 649; *Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201; 89 Ops. Cal. Atty. Gen 49 (2006).) “California courts have consistently held that the public officer cannot escape liability for a section 1090 violation merely by abstaining from voting or participating in discussions or negotiations” (*Thomson, supra* at 649.)
- Conversely, when an employee, rather than a board member, is financially interested in a contract, the employee’s agency is prohibited from making the contract by Section 1090 only if the employee was involved in the contract-making process. Therefore, as long as the

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<sup>3</sup> It is noteworthy to point out that Opinions issued by the Attorney General’s Office are entitled to considerable weight (*California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 17.), especially where, as here, it has regularly provided advice concerning Section 1090. et al. (*Thorpe v. Long Beach Community College Dist.*, (2000) 83 Cal.App.4th 655, 662; *Freedom Newspapers, Inc. v. Orange County Employees Retirement System* (1993) 6 Cal.4th 821, 829.)

employee plays no role whatsoever in the contracting process (either because such participation is outside the scope of the employee's duties or because the employee disqualifies himself or herself from all such participation), the employee's agency is not prohibited from contracting with the employee or the business entity in which the employee is interested. (See 80 Ops.Cal.Atty.Gen. 41 (1997).)

Alternate board members (unlike regular board members) have no authority except when substituting for regular members. (82 Ops. Cal. Alt. Gen 29 (1999).) Moreover, the SCPPA By-Laws make it clear that that an Alternate will have all powers of a member of the Board of Directors only when acting in such capacity. Therefore, since alternates members lack the authority to act when not serving in the place of a regular member, they are more like an employee of the agency and would not be subject to the conclusive presumption of participation in every decision. Therefore, we look to see if the alternates actually participated in the decision. Thus, we analyze whether the individuals participated in the contracting process.

*Michael Webster*

As an Alternate, Mr. Webster had no authority when not substituting for the regular member. According to the facts presented, the subject of recruitment of a new Executive Director was not on the agenda of any meetings he attended as an Alternate, and he did not participate in any discussions concerning recruitment, or the terms and conditions of employment, of a new Executive Director.

In addition, although Mr. Webster did receive the May 20, 2016, email from the SCPPA regarding the job description for the Executive Director position, he stated that he did not communicate with the SCPPA regarding the Executive Director job description.

Mr. Webster did not participate in the making of the employment agreement and, therefore, Section 1090 does not prohibit him from taking the position.

*Jaroslav (Yarek) Lehr*

As an Alternate, Mr. Lehr had no authority when not substituting for the regular member. According to the facts presented, the subject of recruitment of a new Executive Director was not on the agenda of any meetings Mr. Lehr attended as an Alternate, and he did not participate in any discussions concerning recruitment, or the terms and conditions of employment, of a new Executive Director.

In addition, Mr. Lehr stated that he did not receive the May 20, 2016, email from the SCPPA regarding the job description for the Executive Director position, and did not communicate with the SCPPA regarding the Executive Director job description.

Mr. Lehr did not participate in the making of the employment agreement and, therefore, Section 1090 does not prohibit him from taking the position.

*Eric Klinkner*

As an Alternate, Mr. Klinkner had no authority when not substituting for the regular member. According to the facts presented, the subject of recruitment of a new Executive Director was not on the agenda of any meetings he attended as an Alternate, and he did not participate in any discussions concerning recruitment.

Section 1090 reaches beyond the officials who actually execute the contract and courts have broadly interpreted "participation in the making of a contract" when applying the section:

The decisional law, therefore, has not interpreted section 1090 in a hypertechnical manner, but holds that an official (or a public employee) may be convicted of violation no matter whether he actually participated personally in the execution of the questioned contract, if it is established that he had the opportunity to, and did, influence execution directly or indirectly to promote his personal interests. (*People v. Sobel* (1974) 40 Cal.App.3d 1046, 1052.)

Thus, "participation in the making of a contract" is defined broadly and includes any act involving the planning, preliminary discussions, negotiations, compromises, reasoning, 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; see also *Stigall v. City of Tafi, supra*, at p. 569.)

In this case, unlike the other alternate members, it appears that Mr. Klinkner had some opportunity for limited participation in a preliminary email discussion about the job description, under which the contract would later be executed. Under these facts alone, we cannot conclude that Mr. Klinkner participated in the "making" of the employment agreement. Thus, we must leave it to the SCPPA and Mr. Klinkner, who have full knowledge of all the facts and circumstances, to make the factual determination as to whether he participated in making the employment contract such that he is prohibited from taking the Executive Director position.

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

Sincerely,

Hyla P. Wagner  
General Counsel



By: Zachary W. Norton  
Senior Counsel, Legal Division

ZWN:jgl

