



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
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July 27, 2016

Hilda Cantú Montoy  
Kerman City Attorney  
2125 Kern Street, Ste 308  
Fresno, CA 93721

Re: Your Request for Advice  
**Our File No. A-16-136**

Dear Ms. Montoy:

This letter responds to your request on behalf of Councilmember Kevin Nehring for advice regarding Section 1090 and the conflict of interest provisions of the Political Reform Act (the “Act”).<sup>1</sup> Please note that we do not advise on any other area of law, 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.

Please note that we are only providing advice under the conflict of interest provisions of the Act and Section 1090, not under other general conflict of interest prohibitions such as common law conflict of interest.

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 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

1. Under the Act, may Councilmember Nehring vote to approve warrants for payments made where his spouse, Lora Nehring, who has been employed since 2014 as an independent contractor to teach classes for the Kerman City Parks and Recreation Department, is the subject of one of the warrants?

2. Does Section 1090 preclude Councilmember Nehring’s participation, or require him to disclose his interest and recuse himself from the above warrant proceeding?

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<sup>1</sup> 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

1. Yes. Councilmember Nehring does not have a conflict of interest under the Act, where the approval of the warrant is ministerial in nature, and no substantive discussion occurs.

2. No. Councilmember Nehring has a noninterest under Section 1091.5(a)(6), where the warrant involves the existing employment of his spouse. His noninterest pursuant to Section 1091.5(a)(6) does not require his recusal or disclosure for this decision.

## FACTS

Councilmember Kevin Nehring was recently appointed in 2016 to fill a vacancy on the Kerman City Council. His spouse, Lora Nehring, has held an independent contractor agreement with the City since July 8, 2014 to conduct classes for the City Parks and Recreation Department.

At the first session attended by Councilmember Nehring, the City Council was asked to approve warrants regarding payments already made by the City as a consent item. Included in the warrants presented for consent, was the warrant for the Councilmember's spouse for services rendered under her independent contract agreement. In approving the warrants, the Council does not exercise discretion as to the payments on the consent calendar and is essentially acknowledging that the payments have been made. The city attorney tabled the consent items pending receiving advice.

## ANALYSIS

### *Political Reform Act*

Section 87100 of the Act prohibits a public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. We examine if the Councilmember is "making a decision" in approving the warrant regarding his spouse's payment.

Pursuant to Regulation 18704(d)(1), an official is not "making or participating in making a government decision" if the official's actions are solely ministerial, secretarial, manual, or clerical. The exception for ministerial decisions is not specifically defined in the Act and has been narrowly construed. (*Torrance* Advice Letter, No. A-94-043.) "Ministerial" actions include those that do not involve discretion as to the results or performance, or are pursuant to a clear objective. (*Id.*) Examples of ministerial actions include: the approval of an expenditure so long as the official had no discretion as to whether the expenditure would be made or the amount (*Smith* Advice Letter, No. A-93-215); and the approval of board minutes, where comments are limited to accuracy issues (*Hickman* Advice Letter, No. A-15-086).

In regards to the warrant decision at issue, you indicate that the payments have already been made, and the warrants are placed on a consent calendar for an "approval." Voting to approve the warrants on a consent calendar, where the payments have already been made, and no substantive discussion occurs as to the payments, falls into a ministerial class of action. Accordingly, Councilmember Nehring would not be "making a governmental decision" under the Act when

voting to approve warrants without a substantive discussion<sup>2</sup> and does not have a conflict of interest under the Act.

### ***Section 1090***

Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties.<sup>3</sup> 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. A contract that violates Section 1090 is void.<sup>4</sup>

As a general rule, 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. However, the Legislature has created various statutory exceptions to Section 1090's prohibition where the financial interest involved is deemed a "remote interest," as defined in Section 1091, or a "noninterest," as defined in Section 1091.5.

Where a remote interest is present, the contract may be lawfully executed provided (1) the officer discloses his or her financial interest in the contract to the public agency; (2) the interest is noted in the public body's official records; and (3) the officer completely abstains from any participation in the making of the contract. (Section 1091.) If a noninterest is present, the contract may be made without the officer's abstention, and generally, a noninterest does not require disclosure unless specified under Section 1091.5. (See *City of Vernon v. Central Basin Mun. Water Dist.* (1999) 69 Cal.App.4th 508, 514-515; and 84 Ops.Cal.Atty.Gen. 158, 159-160 (2001).)

We employ a six-step analysis to determine whether an official has a disqualifying conflict of interest under Section 1090. These steps are: (1) does the matter involve a public officer or employee; (2) involve a contract; (3) is the official making or participating in making a contract; (4) does the official have a financial interest in the contract; (5) does a remote or non-interest exception apply; and (6) does the rule of necessity apply?

Steps one, two, and four are satisfied here, and do not require additional analysis: (1) Councilmember Nehring is a public official subject to Section 1090; (2) this matter involves a warrant relating to payment under the terms of the spouse's employment contract; and (4) the

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<sup>2</sup> If the vote to approve is substantive, Councilmember Nehring would have a conflict of interest in making the decision. Please contact us for further information if this situation arises. When a public official who holds an office specified in Section 87200 (including city council members) has a conflict of interest in a decision noticed at a public meeting, he or she must: (1) immediately prior to the discussion of the item, orally identify each type of interest involved in the decision as well as details of the economic interest on the record of the meeting; (2) recuse himself or herself, and (3) leave the room for the duration of the discussion and/or vote on the item. (Section 87105; Regulation 18707.)

<sup>3</sup> *Thomson v. Call* (1985) 38 Cal.3d 633, 646.

<sup>4</sup> *Stigall v. Taft* (1962) 58 Cal.2d 565, 569.

financial interest is in the spouse's income from her performance under the contract. We focus on the issues presented in steps 3 and 5.

*Step Three: Is the official making or participating in making a contract?*

“Participation in the making of a contract” under Section 1090 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; see also *Stigall v. City of Taft*, (1962) 58 Cal.2d 565, 569.) Making or participating in making a contract has been broadly construed to include those instances where a public official has influence over the contract or its terms. (See 80 Ops. Cal. Atty. Gen. 41.) Where an official is a member of a board or commission that has the power to execute the contract at issue, 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, supra*, 38 Cal.3d 633, 649; *Stigall, supra*, 58 Cal.2d 565, 570-571; *Fraser-Yamor Agency, Inc. v. County of Del Norte, supra*, at pp. 211-212; 89 Ops. Cal. Atty. Gen. 49 (2006).)

As previously discussed, this matter involves a consent item for a warrant that was previously paid, so it may be more accurate to characterize this action as “taking notice of payments made.” However, the Legislature has specifically carved out an exception with respect to actions related to the pre-existing employment of a spouse, which is applicable and warrants further analysis.

*Step Five: Does either a remote interest or a non-interest exception apply?*

Section 1091.5, subdivision (a), provides that an officer shall not be deemed to be interested in a contract if his 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.

Councilmember Nehring's spouse's employment with the City commenced in July 2014, almost two years before Councilmember Nehring was appointed to the City Council. The rationale for this exception is stated an Attorney General Opinion related to a promotion of a school board member's spouse:

We believe that the Legislature, in enacting subdivision (a)(6), recognized that the original employment contract with the employed spouse would have been made by a prior, disinterested officer or board. Accordingly, to permit a continuation of the same employment would involve little risk to the public interest despite 1) the fact that the other spouse would subsequently have a financial interest therein and 2) the fact that the other spouse, or a board upon which he or she served, might be required to take actions with respect to that employment (e.g., entering into a new MOU or renewing the contract of a tenured teacher). We additionally believe that

the one year threshold requirement of the exception was placed therein to prevent the possibility of any influence by the spouse who would subsequently assume the interested office or employment.

(69 Ops.Cal.Atty.Gen 255, at pp. 14-15.)

The Attorney General's Opinion further details that the exception does not apply where a "change in the status quo" of the spouse's employment is involved in a public official's decision:

. . . we have in essence concluded that subdivision (a)(6) of section 1091.5 of the Government Code was enacted to permit a continuation of the status quo with respect to a board member's spouse's employment who meets the one year requirement of the subdivision. Accordingly, a change in that status quo would not fall within the apparent intent of the subdivision. The above analysis with respect to promotions recognizes this.

(69 Ops.Cal.Atty.Gen, *supra*, at pp. 14-15.)

Therefore, we conclude that Section 1090 does not prohibit the Councilmember from voting to approve, or the City from approving, warrants for payments to his spouse for teaching classes for the City's Parks and Recreation Department 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,

Hyla P. Wagner  
General Counsel

/s/

By: L. Karen Harrison  
Counsel, Legal Division

LKH:jgl