



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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December 7, 2018

Shawn M. Mason
City Attorney
City of San Mateo
330 West Twentieth Avenue
San Mateo, CA 94403-1388

Re: Your Request for Advice
Our File No. A-18-236

Dear Mr. Mason:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the “Act”)¹ and Section 1090. 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 conflicts 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.

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 San Mateo 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).)

QUESTIONS

1. Does Mayor Bonilla have a financial interest in the City Council decision on the proposed Project Labor Agreement under the Act that would require him to recuse himself from that decision as a result of his 401(k) account or lifetime pension benefit?

2. Does Mayor Bonilla have a financial interest in the City Council decision on the proposed Project Labor Agreement under the Section 1090 as a result of his 401(k) account or lifetime pension benefit?

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

1& 2. No. Mayor Bonilla's 401(k) account and pension plan are not disqualifying financial interests for purposes of the Act's or Section 1090's conflict-of-interest provisions.

FACTS AS PROVIDED BY REQUESTOR

The Project

The City of San Mateo owns and operates a wastewater treatment plant which treats wastewater generated within the city and neighboring jurisdictions before it is released into the San Francisco Bay. The operation of the plant is subject to regulation under state and federal law, and is permitted by the Regional Water Quality Control Board. The City is undertaking a significant plant expansion and renovation project ("project") in order to comply with a 2012 Cease and Desist Order from the Board. The costs of this project are estimated at approximately \$411 million, and the project will take about 5 years to complete.

The City has selected the Construction Manager at Risk ("CMAR") method of project delivery, and the project has been divided into three phases. The City plans to award the contract for the first phase in March 2019.

The Project Labor Agreement

Earlier this year, City staff approached representatives of the various building trade unions about entering into a Project Labor Agreement ("PLA") for this project. Union representatives and City staff have met to negotiate the terms of an agreement that will be presented to the City Council for its consideration.

Under the PLA, the signatory unions would agree not to strike during the project, and would agree to expedited arbitration of any issues that arise during the project to avoid protracted disruption of project construction. In exchange, the City would agree to require all contractors and subcontractors to hire workers for the project through the local union hiring halls, and to comply with the terms of any applicable trade union master agreement governing the work being performed on the project. The master agreements provide for wages, hours, benefits and other terms and conditions of employment.

The PLA, if approved by the City Council, would be executed by the trade unions whose members perform the type of work completion of the project will require. This would include execution by Northern California Carpenters Regional Council and Carpenters 46 Northern California Counties Conference who represent carpenters in the region.

The master agreement for carpenters in this region provides for the enrollment of employee carpenters in a defined benefit pension program administered by the Carpenters Pension Trust Fund for Northern California ("Trust Fund"). Under this program employer contributions are made into the Trust Fund for carpenters during their employment. Upon retirement, individuals enrolled in the program will receive a lifetime pension. The amount of the pension payment is determined according to a formula tied to the number of hours worked by the individual.

The master agreement also provides for contributions to a 401(k) account on behalf of the employee. A 401(k) is an employer sponsored savings plan by which an employee can save and invest a portion of their earnings on a pre-tax basis.

Mayor Bonilla's Retirement Benefits

Mayor Bonilla worked as a carpenter and then as a field representative for Northern California Carpenters Regional Council. As a benefit of this employment, Mayor Bonilla was enrolled in the Trust Fund defined benefit plan. Mayor Bonilla also put aside some of his earnings in a 401(k) account. Mayor Bonilla retired in 2011, and since that time has received a monthly pension.

Mayor Bonilla still has funds in his 401(k) account. You have confirmed consist entirely of mutual funds managed by the John Hancock Company.

Mayor Bonilla's pension benefit will be paid during his lifetime, and exceeds \$500 per year. Mayor Bonilla's pension benefit is fixed, and will not change if the PLA is approved. Mayor Bonilla is married, and he has no dependent children.

The Trust Fund

The Trust Fund is a defined benefit pension plan qualified under Internal Revenue Code Section 401(a). Under the plan, an individual's employer makes contributions to the Trust Fund on behalf of the individual for each covered hour of work. If the individual earns a sufficient number of hours, the individual earns an entitlement to a monthly lifetime pension benefit. The amount of the monthly benefit is determined by the number of hours worked.

The Trust Fund is a multi-billion-dollar program. As of August 2017, the Trust Fund had nearly 22,000 active participants and about \$3 billion in assets. During the Trust Fund's 2016 plan year (ending in August 2017), the Trust Fund received almost \$289 million in employer contributions.

In 2006 Congress enacted the Pension Protection Act of 2006 to address concerns about the financial condition of pension programs. Starting in 2009, the Trust Fund was identified as being in a critical status under the Pension Protection Act of 2006, and was required to develop a Rehabilitation Plan to address concerns about the ability of the Trust Fund to meet its obligations to retirees under the plan. Since that time, the Trust Fund has implemented its Rehabilitation Plan so that as of the end of 2016, the Trust Fund was 73.6% funded. The Trust Fund's actuary projects that the Trust Fund will be fully funded by 2024.

Impact of Approval of the PLA on the Trust Fund

If the City Council authorizes execution of the PLA, all workers on the project performing work covered by the carpenter's union's collective bargaining agreements will be required to be enrolled in the Trust Fund's defined benefit pension plan. The City has not yet awarded construction contracts for the project, so it is not possible to calculate the precise financial effect of

the PLA, if any, at this time. However, the City does have sufficient information to provide a basis for getting a sense of an order of magnitude of the possible effect of approval of the PLA.

As part of a project estimating effort, the CMAR has obtained a number of detailed, preliminary quotes from a list of prequalified contractors. From this information, the City has determined that over the 5-year execution of the project, workers within the carpenter trade will work approximately 253,000 hours on the project. Under current agreements, employers are required to pay into the Trust Fund \$11.10 for each hour worked. Thus, assuming every worker on the project were a new enrollee into the Trust Fund pension plan, about \$2.8 million would be deposited into the Trust Fund over the 5-year course of the project, or about \$560,000 per year.²

ANALYSIS

The Political Reform Act

Section 87100 prohibits any public official from making, participating in making, or using his or her official position to influence a governmental decision in which the official has a financial interest. In furtherance of this goal, the Act requires that assets and income of public officials which may be materially affected by their official actions should be fully disclosed and in appropriate circumstances the officials should be disqualified from acting in order that conflicts of interest may be avoided. (Section 81002(c).)

Section 87103 provides that a public official has a "financial interest" in a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official's financial interests. Section 87103 also sets forth the interests from which a conflict of interest may arise under the Act. They include:

- Any business entity in which the public official has a direct or indirect investment worth two thousand dollars (\$2,000) or more. (Section 87103(a).)
- Any source of income, except gifts or loans by a commercial lending institution made in the regular course of business on terms available to the public without regard to official status, aggregating five hundred dollars (\$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).)
- Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d).)

² This amount almost certainly significantly overestimates the amounts that would be contributed to the Trust Fund as a result of the execution of the PLA. It is very likely that most, if not all, of the carpenters on the project would already be union members enrolled in the Trust Fund. The project is very large requiring a large workforce. Most of the larger regional contractors likely to bid on the project are union shops and already make contributions on behalf of their employees into the Trust Fund.

Diversified Mutual Funds:

Pursuant to the specific language of Section 82034, the term “investment” does *not* include an interest in a diversified mutual fund registered with the SEC. In addition, there is nothing in your facts to suggest that the PLA would involve either the John Hancock Company or the mutual funds that comprise Mayor Bonilla’s 401(k).

Pension Plan:

Section 82030(b)(11) of the Act specifically excludes from the definition of “income,” any “[p]ayments received under a defined benefit pension plan qualified under Internal Revenue Code Section 401(a). On this basis, the Commission has advised that an official likewise has no separate investment interest under the Act in the defined-benefit pension plan itself. (*Bogh Advice Letter*, No. A-01-173.) Thus, for purposes of the Act’s conflict of interest provisions, neither the 401(a) pension plan itself nor payments received under the plan are potentially disqualifying financial interests under the Act.

Accordingly, the Act does not prohibit Mayor Bonilla from taking part in the decisions merely because of his 401(k) account or his pension plan.

Section 1090*Diversified Mutual Funds:*

Under Section 1090, “the prohibited act is the making of a contract in which the official has a financial interest.” (*People v. Honig, supra*, at p. 333.) Officials are deemed to have a financial interest in a contract if they might profit from it in any way. (*Ibid.*) Although Section 1090 does not specifically define the term “financial interest,” case law and Attorney General opinions state that prohibited financial interests may be indirect as well as direct, and may involve financial losses, or the possibility of losses, as well as the prospect of pecuniary gain. (*People v. Vallerga* (1977) 67 Cal.App.3d 847, 867, fn. 5; *Terry v. Bender* (1956) 143 Cal.App.2d 198, 207-208; 85 Ops.Cal.Atty.Gen. 34, 36-38 (2002); 84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).)

As discussed above, the PLA would be executed by the trade unions whose members perform the type of work completion of the project will require. This would include Northern California Carpenters Regional Council and Carpenters 46 Northern California Counties Conference who represent carpenters in the region. As such, there is nothing in your facts to suggest that the PLA would in any way involve either the John Hancock Company or the mutual funds that comprise Mayor Bonilla’s 401(k). Under these circumstances, Mayor Bonilla’s does not have a financial interest in the contracts in question under Section 1090 based upon his 401(k) account.

Pension Plan:

We now consider whether Mayor Bonilla’s defined benefit pension plan qualified under Internal Revenue Code Section 401(a) and the payments made under such a plan are financial interests for purposes of Section 1090. Section 1090 offers no guidance on whether an interest in a defined-benefit pension plan and fixed payments under that plan are a type of financial interest.

We have previously determined, in an advice letter also concerning an interest in a defined-benefit pension plan and fixed payments, that a 401(a) plan and the payments made under such a plan are not financial interests for purposes of Section 1090. (*Peters* Advice Letter, No. C-14-036.) We found no financial interest in the plan and payments made under the plan because payments made under the plan are defined, *fixed* benefits, that will not be, and indeed *cannot* be, by operation of law, affected by any contract. In this case, Mayor Bonilla has a 401(a) plan, and the potential PLA could not affect the payments due under the plan because they are defined and fixed. Though you have noted that the Trust Fund was identified as being in critical status under the Pension Protection Act of 2006, the Trust Fund has since taken action and projects it will be fully funded by 2024 regardless of whether the project is approved. Therefore, consistent with our determination in the *Peters* Advice Letter, *supra*, we likewise find that Mayor Bonilla does not have an interest in the contracts in question under Section 1090 based upon his 401(a) plan or the payments made thereunder.

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

Sincerely,

Dave Bainbridge
General Counsel



By: Zachary W. Norton
Senior Counsel, Legal Division

ZWN:jgl