



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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April 30, 2021

Ryan T. Plotz
District Counsel
The Mitchell Law Firm, LLP
426 First Street
Eureka, CA 95501

Re: Your Request for Advice
Our File No. A-21-050

Dear Mr. Plotz:

This letter responds to your request for advice on behalf of Humboldt Community Services District Director Michael Hansen regarding the conflict of interest provisions of the Political Reform Act (“Act”) and Government Code Section 1090, et seq.¹ Please note that we are only providing advice under the Act and Section 1090, not under other general conflict of interest prohibitions such as common law conflict of interest, including Public Contract Code.

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 Humboldt 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

Under the Act and Section 1090, may Director Hansen take part in the Humboldt Community Services District’s decisions regarding its contract with the City of Eureka concerning shared wastewater treatment facilities, including potential amendment of the contract, given that Director Hansen is also employed by the City of Eureka?

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

Although Director Hansen's City employment does not constitute a disqualifying conflict of interest under the Act, it constitutes a "remote interest" for purposes of Section 1090. Accordingly, he may not participate in the contract decisions. However, the District may make contract-related decisions involving the City provided that Director Hansen discloses his interest in the contract to the District, the interest is noted in the District's official records, and he abstains from any participation in making or approving any contract-related decision. (Section 1091(a).)²

FACTS AS PRESENTED BY REQUESTER

The Humboldt Community Services District ("District") provides water, wastewater, and other municipal services to an unincorporated area of Humboldt County. The District is governed by a five-person Board of Directors, elected at-large from within the District's boundaries. The Board of Directors is principally responsible for development of policy and the hiring and supervision of a General Manager, who serves as the chief executive officer of the District and is tasked with implementing the Board's policy directives.

Michael Hansen is a newly seated member of the District's Board of Directors. Director Hansen is employed as the Deputy Director of Public Works – Utilities Operations for the City of Eureka ("City"). According to the City's website, the Utilities Operations Division is responsible for operating and maintaining the City's potable water treatment and storage facilities, and the City's wastewater treatment facilities. The wastewater treatment facilities serve the City and the adjacent Humboldt Community Service District.

The District and the City have an existing contractual relationship for the joint use, operation, maintenance, and associated expenses for a wastewater treatment plant, which treats wastewater from both the City and the District. This contract was entered into years prior to Director Hansen becoming a member of the Board of Directors.

As the Deputy Director of Public Works – Utilities Operations, Director Hansen has managerial responsibility to oversee the wastewater treatment plant on behalf of the City. A dispute has arisen and now exists between the City and the District regarding the joint use and operation of the wastewater treatment facilities under the existing contract. The District has engaged outside counsel to advise the District as to the ongoing dispute and possible resolutions, which may include revisions to the existing contract or other agreements between the District and the City.

ANALYSIS

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 his official position to

² We note that you have asked only whether Director Hansen can take part in decisions by the District. To the extent Director Hansen may wish or be asked by the City to take part in the contracting process with the District in his capacity as Deputy Director of Public Works, we recommend he seek additional formal advice.

influence a governmental decision in which he knows or has reason to know he 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 his or her immediate family,” or on certain specified economic interests. (Section 87103.) Among those specified economic interests is “[a]ny 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).) However, under the Act, “income” expressly does not include “[s]alary and reimbursement for expenses or per diem, and social security, disability, or other similar benefit payments received from a state, local, or federal government agency” (Section 82030(b)(2).) Accordingly, Director Hansen’s income as an employee for the City does not constitute a potentially disqualifying source of income interest for purposes of the Act.

Section 1090

Under Section 1090, public 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.) 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.) Additionally, a decision to modify, extend, or renegotiate a contract constitutes involvement in the making of a contract under section 1090. (See, e.g., *City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, 193; see also 98 Ops.Cal.Atty.Gen. 102 (2015) [“It is well settled that changes to existing contracts are themselves ‘contracts’ under section 1090”].)

The Legislature has created various statutory exceptions to Section 1090’s prohibition where the financial interest involved is deemed to be a “remote interest,” as defined in Section 1091, or a “noninterest,” as defined in Section 1091.5. Of the statutory exceptions established for a remote interest and noninterest, two exceptions for contracts between government agencies are potentially applicable. First, under Section 1091(b)(13), an agency board member that receives salary, per diem, or reimbursement for expenses from another government entity has a remote interest in a contract between the two agencies. Under Section 1091.5(a)(9), an officer or employee of a government agency receiving salary, per diem, or reimbursement for expenses from another government entity has a noninterest in a contract between the two agencies “unless the contract directly involves the department of the governmental entity that employs the officer or employee, provided that the interest is disclosed to the body or board at the time of consideration of the contract, and provided further that the interest is noted in its official record.” (Section 1091.5(a)(9).)

The contract at issue involves the department of the governmental entity that employs Director Hansen and, therefore, the Section 1091.5(a)(9) noninterest exception is inapplicable. However, given that Director Hansen receives salary from the City, Section 1091(b)(13) is

applicable and his interest in the contract between the District and the City is remote. Under Section 1091, Director Hansen may not participate in the decision due to his remote interest. The District may make contract-related decisions, including amending the contract or entering a new contract with the City, provided that Director Hansen discloses his interest in the contract to the District, the interest is noted in the District's official records, and he abstains from any participation in making or approving any contract-related decision. (Section 1091(a).)

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

Sincerely,

Dave Bainbridge
General Counsel



By: Kevin Cornwall
Counsel, Legal Division

KMC:dkv