



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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July 25, 2022

Taylor M. Anderson
Deputy City Attorney
411 W. Ocean Boulevard, 9th Floor
Long Beach, CA 90802

Re: Your Request for Advice
Our File No. A-22-066

Dear Ms. Anderson:

This letter responds to your request for advice on behalf of Long Beach City Councilmember Al Austin regarding the conflict of interest provisions of the Political Reform Act (the “Act”) and Section 1090.¹

Please note that we are only providing advice under the conflict of interest provisions of the Act and Section 1090 and 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 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).)

QUESTION

Under the Act and Section 1090, may Long Beach City Councilmember Al Austin take part in City Council decisions that would impact City-employed members of the International Association of Machinists and Aerospace Workers (“IAM”), a labor union Councilmember Austin is a member of and that provides him with health care benefits?

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.

CONCLUSION

While we cannot provide specific advice regarding future hypothetical decisions that have not yet been identified, generally a City Council decision involving a memorandum of understanding with City-employed IAM members would not violate the Act or Section 1090. Such a decision would not have a reasonably foreseeable, material financial effect on Councilmember Austin's source of income or personal finances, nor would it involve a financial interest in the contract. Councilmember Austin may wish to seek advice in the future if he is uncertain about potential conflicts related to other specific governmental decisions.

FACTS AS PRESENTED BY REQUESTER

Councilmember Austin is serving his third term as a member of the Long Beach City Council ("City Council"). Under the Charter of the City of Long Beach, the nine-member City Council has broad authority over contracts and policies in the City of Long Beach ("City").

As a City Councilmember, Councilmember Austin will vote on final decisions, and make contractual and policy commitments on a wide range of City business, including labor negotiations, labor agreements, and salary adjustments of unrepresented and represented City employees. Some of these decisions will involve a direct impact to members of IAM employed by the City. IAM has approximately 700,000 active members throughout North America and 2,839 members employed by the City.

Councilmember Austin is employed by AFSCME Council 57, AFL-CIO, a 501(c)(5) labor organization with approximately 35,000 members throughout Northern California and the Central Valley. He works as a "Business Agent" for AFSCME Council 57 and his responsibilities include representing the collective bargaining interest of Health and Social Services professions who are employed with the State of California. Contract negotiations, due process, administrative hearings, leadership development, and organizing campaigns are also included in his job responsibilities.

For several years, Councilmember Austin has received healthcare benefits through AFSCME Council 57. Recently, a clause was identified in the AFSCME Council 57 and Staff Union Memorandum of Understanding ("MOU") that requires AFSCME Council 57 to pay dues to IAM to be included in IAM's health care benefits plan. The MOU states, "[a]ny employee covered by the Machinists Health and Welfare Plans will have union dues deducted by the Council from their payroll checks to be submitted to [IAM]." The MOU also provides, "[f]or purposes of providing Medical, Dental, Orthodontics, Vision, Chiropractic, Prescription Drug and Life Insurance for eligible employees and their dependents, [AFSCME Council 57] agrees to pay the necessary contributions to maintain the level of benefits for coverage under the Automotive Industries Welfare Fund."

The AFSCME C57 staff union elected to join IAM to maintain their healthcare benefits plan in April 2022. Therefore, effective April 22, 2022, Councilmember Austin is a dues-paying member of IAM. Both AFSCME Council 57 and IAM are 501(c)(5) nonprofit organizations.

No specific item is coming before the City Council in the immediate future, but items that affect IAM members in Long Beach do come before the City Council, including an MOU between the City and IAM, which may be extended or renewed in the future. Decisions that come before the

City Council regarding IAM directly affect members of IAM employed by the City of Long Beach. Since Councilmember Austin is a member of IAM through his employer, and not through his work as a City Councilmember, he believes contracts and negotiations affecting members of IAM employed by the City would be unlikely to have ancillary effects on his benefits, stating, “[c]omparable data for wage and benefits [to be used in future negotiations between AFSCME Council 57 and IAM] would be derived from other staff union agreements, which would be considered non-profit labor unions.”

ANALYSIS

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 [their] official position to influence a governmental decision in which [the official] 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 include “[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).)

Councilmember Austin has an economic interest in AFSCME Council 57 as a source of income, as well as an economic interest in his personal finances. He doesn’t have an economic interest in IAM, as it is his employer AFSCME Council 57 that pays a contribution toward his health insurance. Potentially, a decision that impacts IAM and its ability to offer and include AFSCME Council 57 in its health care plan could impact Councilmember Austin’s personal finances. An official always has an interest in the official’s own personal finances and those of a member of the official’s immediate family. (Regulation 18700(b)(6).)

Regulation 18701(a) provides the applicable standard for determining the foreseeability of a financial effect on an economic interest explicitly involved in the governmental decision. It states, “[a] financial effect on a financial interest is presumed to be reasonably foreseeable if the financial interest is a named party in, or the subject of, a governmental decision before the official or the official’s agency. A financial interest is the subject of a proceeding if the decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the financial interest, and includes any governmental decision affecting a real property financial interest as described in Regulation 18702.2(a)(1)-(6).”

Where, as here, an official’s economic interest is not explicitly involved in the governmental decision, the applicable standard for determining the foreseeability of a financial effect on the economic interest is found in Regulation 18701(b). That regulation provides, “[a] financial effect need not be likely to be considered reasonably foreseeable. In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official’s control, it is not reasonably foreseeable.”

The reasonably foreseeable financial effect of a governmental decision on an official's financial interest in a source of income is material if the source is a nonprofit organization and the decision may result in an increase or decrease of the organization's annual gross receipts, or the value of the organization's assets or liabilities, in an amount equal to or greater than \$1,000,000, or five percent of the organization's annual gross receipts and the increase or decrease is equal to or greater than \$10,000. (Regulation 18702.3(a)(3)(A).)

The reasonably foreseeable financial effect of a governmental decision on an official's financial interest in a nonprofit source of income is also material if the decision may cause the organization to incur or avoid additional expenses or to reduce or eliminate expenses in an amount equal to or more than \$250,000, or one percent of the organization's annual gross receipts and the change in expenses is equal to or greater than \$2,500. (Regulation 18702.2(a)(3)(B).)

Under a separate materiality standard, commonly referred to as the "nexus test," any reasonably foreseeable financial effect on a source of income to a public official or the official's spouse is material if the decision will achieve, defeat, aid, or hinder a purpose or goal of the source and the official or the official's spouse receives or is promised the income for achieving the purpose or goal. (Regulation 18702.3(b).)

As noted above, Councilmember Austin also has an economic interest in his personal finances. Generally, a governmental decision's reasonably foreseeable financial effect on a public official's financial interest in his or her personal finances or those of immediate family, also referred to as a "personal financial effect," is material if the decision may result in the official or the official's immediate family member receiving a financial benefit or loss of \$500 or more in any 12-month period due to the decision. (Regulation 18702.5(a).) However, a personal financial effect is not material if the decision would establish or change the benefits or retirement plan of the official or the official's immediate family member, and the decision applies equally to all employees or retirees in the same bargaining unit or other representative group. (Regulation 18702.5(b)(4).)

Items that affect IAM members employed by the City occasionally come before the City Council, including an MOU between the City and IAM regarding members of IAM employed by the City, which may be extended or renewed in the future. Whether such a governmental decision will have a reasonably foreseeable, material financial effect on Councilmember Austin's economic interests is determined on a decision-by-decision basis and, thus, we are unable to determine whether yet to be identified decisions would have reasonably foreseeable, material financial effects on Councilmember Austin's economic interests.

With respect to future MOU-related decisions, however, it appears unlikely that a decision affecting City-employed IAM members would meet the monetary thresholds under Regulation 18702.3 to establish a material financial effect on AFSCME Council 57 as a nonprofit source of income. IAM has approximately 700,000 active members across North America, only 2,839 of whom are employed by the City. AFSCME Council 57 has approximately 35,000 members across Northern California and the Central Valley. Given these facts, the limited scope of MOU decisions affecting City-employed IAM members indicates such decisions would not meet the materiality thresholds established under Regulation 18702.3(a)(3)(A)-(B).

Further, a City Council decision pertaining to an MOU with City-employed IAM members would not violate the nexus test. Councilmember Austin works as a "Business Agent" for AFSCME

Council 57 and his responsibilities include representing the collective bargaining interest of Health and Social Services professions who are employed with the State of California. Contract negotiations, due process, administrative hearings, leadership development, and organizing campaigns are also included in his job responsibilities. Although the City Council decision involves collective bargaining interests, it involves an entirely separate membership body and there is no indication the decision would achieve, defeat, aid, or hinder a purpose or goal of AFSCME Council 57, nor is Councilmember Austin paid or promised income for achieving any such purpose or goal.

Likewise, it also appears unlikely that an MOU decision involving City-employed members of IAM would impact Councilmember Austin's personal finances. Councilmember Austin is employed by AFSCME Council 57, not the City. The healthcare benefits he receives through IAM's health care plan are established by a MOU between AFSCME Council 57 and IAM, entirely separate from the MOU between the City and IAM. Councilmember Austin has indicated that "[c]omparable data for wage and benefits [to be used in future negotiations between AFSCME Council 57 and IAM] would be derived from other staff union agreements, which would be considered non-profit labor unions." Based on this information, it appears that the provisions of an MOU between IAM and the City are unlikely to meaningfully affect MOU negotiations between IAM and AFSCME Council 57. Thus, it is not reasonably foreseeable that the decisions will have a material effect on Councilmember Austin's personal finances as any financial effect is too hypothetical. Further, even if a City decision did somehow indirectly affect his benefits, it would impact all employees in the same representative group and therefore not qualify as material under Regulation 18702.5(b)(4).

Section 1090

Additionally, an MOU between the City and IAM would constitute a contract for purposes of Section 1090, which requires that public officials "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. 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.)

Although Councilmember Austin receives healthcare benefits through AFSCME Council 57 and the organization's MOU with IAM, the potential labor agreement between the City and IAM does not directly involve AFSCME Council 57. AFSCME Council 57 and the City are not only separate entities, but also separate types of entities, such that data regarding wages and benefits from the MOU between the City and IAM would be unlikely to meaningfully influence the MOU between AFSCME Council 57 and IAM. Thus, the facts do not indicate that AFSCME Council 57 would be implicated by an MOU between the City and IAM regarding City-employed members of IAM. However, separate from his interest in AFSCME Council 57 as a source of income, Councilmember Austin is a nonsalaried member of IAM, the contracting party.

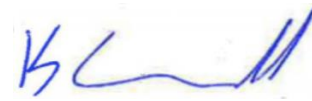
Under Section 1091.5(a)(7), a public official is deemed not to have an interest in a contract if the official's interest is "[t]hat of a nonsalaried member of a nonprofit corporation, provided that this interest is disclosed to the body or board at the time of the first consideration of the contract, and provided further that this interest is noted in its official records." Accordingly, although Councilmember Austin is a member of IAM, the party contracting with the City, he does not have an interest in the MOU for purposes of Section 1090 as long as he discloses that interest to the City Council prior to consideration of the MOU renewal and that interest is noted in the City Council's records.

In the future, if Councilmember Austin is uncertain of potential conflicts regarding a specific governmental decision or contract, he may want to seek additional advice regarding that specific decision. 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

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