



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
1102 Q Street • Suite 3000 • Sacramento, CA 95811
(916) 322-5660 • Fax (916) 322-0886

September 9, 2022

James S. McNeill
Assistant City Attorney
City of San Diego
1200 Third Ave, Suite 1620
San Diego, CA 92101-4178

Re: Your Request for Advice
Our File No. A-22-074

Dear Mr. McNeill:

This letter responds to your request for advice on behalf of the City of San Diego regarding Government Code Section 1090, et seq.¹ Please note that we are only providing advice under 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 San Diego 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

Would the exception to Section 1090 for "public services generally provided" as set forth in Section 1090.5(a)(3) apply such that Councilmembers Marni von Wilpert, Raul Campillo, Sean Elo-Rivera, Joe LaCava, Jennifer Campbell, and Stephen Whitburn ("Group A") would be permitted to vote to extend PERB's Make-Whole Remedy to themselves, with the exception of the 7% interest penalty, given all other similarly situated City employees impacted by Proposition B were provided the Make-Whole Remedy?

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

Yes. The exception to Section 1090 for “public services generally provided” as set forth under Section 1090.5(a)(3) would apply so that Councilmembers von Wilpert, Campillo, Elo-Rivera, LaCava, Campbell, and Whitburn would be permitted to vote to extend PERB’s Make-Whole Remedy to themselves.²

FACTS AS PRESENTED BY REQUESTER

Proposition B and Its Invalidation

On June 5, 2012, City voters approved Proposition B, a pension reform initiative amending the City’s Charter. As a result, employees hired on or after July 20, 2012, other than sworn police officers, are no longer eligible to participate in the City’s defined benefit plan, SDCERS, and are only eligible to participate in a defined contribution plan. The City provides post-Proposition B employees and elected officers with their defined contribution plan benefit through the City’s Supplemental Pension Savings Plan-H. A defined contribution plan is a retirement program in which each employee has an individual account into which contributions are deposited. Employees direct the investment of their contributions, and a given employee’s retirement benefit is determined solely by the balance in his or her account at the time of retirement. In contrast, under a defined benefit plan, like SDCERS, an employee is entitled to a specified monthly benefit for life at retirement. The benefit is based on a formula, which is usually a percentage of salary multiplied by an employee’s years of service.

In December 2015, the PERB issued a decision (the “PERB Order”) in an unfair labor practice charge filed by certain City recognized employee organizations (“REOs”), ruling that the City had violated the Meyers-Milias-Brown Act (“MMBA”) when it failed to meet and confer with the REOs over the language of Proposition B prior to placing it on the June 2012 ballot.

On March 25, 2019, the Court of Appeal affirmed the PERB Order with the following modifications: (1) The City must meet and confer with the REOs over the effects of Proposition B; (2) For the time period that ends with the completion of the bargaining process (including the exhaustion of impasse measures, if an impasse occurs), the City must pay the affected current and former employees represented by the REOs the difference between the compensation (including retirement benefits) the employees would have received prior to when Proposition B took effect and the compensation those employees received after Proposition B took effect (the “Make-Whole Remedy”), plus seven percent annual interest on that difference; and (3) The City must meet and confer at the REOs’ request and is precluded from placing a Charter amendment on the ballot that is advanced by the City that affects employee pension benefits and/or other negotiable subjects until the bargaining process is complete.

On January 5, 2021, in a quo warranto proceeding before the Superior Court, the Court conducted a one-day virtual bench trial at the request of all parties and ruled that Proposition B was invalid and awarded costs to the REOs and the City. This judgment is final.

² You have also asked about the possible application of the “rule of necessity.” However, given our conclusion that the “public services generally provided” exception applies, we do not analyze this further.

City Council Actions to Comply with the Court Order and PERB Order

In July 2021, the City Council initially approved amendments to the SDCERS' provisions of the San Diego Municipal Code (Municipal Code) to open SDCERS to participation for all newly hired employees and elected officials initially assuming office after July 10, 2021. No current City Councilmembers were impacted by this action as they all assumed office prior to July 10, 2021.

Next, the City met and conferred with impacted REO's for several months regarding the unwinding of Proposition B for current City employees hired prior to July 10, 2021 who were impacted by Proposition B. Ultimately, the City Council approved agreements with the City's impacted REOs regarding the terms of prospective participation in SDCERS and the application of PERB's Make Whole Remedy regarding these employees.³

In short, the agreements open SDCERS to prospective participation for represented employees impacted by Proposition B and provide the City will "make whole" these represented employees for any costs necessary to purchase SDCERS service credit for the time they were employed by the City but not participating in SDCERS because of Proposition B, with the City getting "credit" for amounts in the employees' SPSP-H accounts. The agreements also provide for a 7% interest payment on the Make-Whole Remedy that goes directly to impacted employees as cash or a retirement plan contribution.

The Make-Whole Remedy process agreed upon by the City and REOs is as follows:

- (1) Those Proposition B-impacted City employees choosing or required to enter the defined benefit plan, SDCERS, are placed into the plan.
- (2) An actuarial calculation of the cost to purchase years of service between the Employee's hire date and the date of entering the plan is prepared.
- (3) The employee's defined contribution plan (SPSP-H) funds accumulated while Proposition B was in effect are used to pay the cost of the calculated service credits.
- (4) The City pays any shortfall between the cost of service credits and the available funds in the employee's SPSP-H account, which payment is the actual Make-Whole Remedy.

Notably, in the resolution approving the agreement with the Municipal Employees Association and Local 127 REOs, the City Council approved the Mayor's recommendation to extend PERB's Make-Whole Remedy to unrepresented employees, who are not covered by PERB's Order, with the exception of the 7% interest payment. The resolution did *not* extend the Make-Whole remedy to Councilmembers impacted by Proposition B.

³ You state that Councilmembers von Wilpert and Campillo recused themselves from all City Council actions applicable to the unwinding of Proposition B for current City employees and elected officials, as they had a financial interest in the PERE-mandated Make-Whole Remedy for their time as former represented City employees while Proposition B was in effect.

Finally, to implement the judgement in the *quo warranto* action and the agreements with the REOs to unwind Proposition B, the City Council approved amendments to SDCERS provisions of the Municipal Code to open the plan to prospective participation for all current employees and elected officers. The approved amendments also codified the Make-Whole Remedy for all current represented and unrepresented employees impacted by Proposition B. While this City Council action opened SDCERS to prospective participation for current Councilmembers impacted by Proposition B, it did not provide Councilmembers with the Make-Whole Remedy available to all other City employees, both represented and unrepresented, impacted by Proposition B. A total of approximately 4,000 current City employees impacted by Proposition B are now entitled to the Make-Whole Remedy.

City Councilmembers' Financial Interest in the Make-Whole Remedy

There are nine members of the City Council. Of these nine, six Councilmembers (Councilmembers Marni von Wilpert, Raul Campillo, Sean Elo-Rivera, Joe LaCava, Jennifer Campbell, and Stephen Whitbum) initially took office while Proposition B was still in effect and thus would have a financial interest in PERB's Make-Whole Remedy, were it extended to them (GROUP A). The City Council has not taken any action to extend PERB's Make-Whole Remedy to Group A Councilmembers.

The remaining three Councilmembers (Councilmembers Monic Montgomery Steppe, Chris Cate, and Vivian Moreno) were employed by the City prior to July 20, 2012, the effective date of Proposition B (GROUP B). Therefore, GROUP B Councilmembers are not implicated by PERB's Make-Whole Remedy if it were extended to Councilmembers, as they were eligible to participate in SDCERS before Proposition B closed the plan to new members. Moreover, because GROUP B Councilmembers were eligible to participate in SDCERS when initially hired, their City retirement benefits were not affected by Proposition B.

ANALYSIS

Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. 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.)

A collective bargaining agreement is a "contract" under Section 1090. (89 Ops.Cal.Atty.Gen., 217, 218-219 (206); 69 Ops.Cal.Atty.Gen. 102, 110 (1986).) Thus, the decision to provide Group A Councilmembers with the Make-Whole Remedy, available to all of the other approximately 4,000 current City employees, involves a contract. Group A Councilmembers are

explicitly within the class of employees subject to the Make-Whole Remedy, and thus financially interested in the decision for purposes of Section 1090.

The Legislature has expressly defined certain financial interests as “remote” or “noninterest” exceptions to Section 1090’s general prohibition. 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.) Where a noninterest is present, the contract may be executed without the abstention. (Section 1091.5.)

Non-Interest - Public Services Generally Provided

You ask specifically about the “noninterest” specified in Section 1091.5(a)(3), which provides that an officer or employee shall not be deemed to be interested in a contract if his or her interest is “[t]hat of a recipient of public services generally provided by the public body or board of which he or she is a member, on the same terms and conditions as if he or she were not a member of the body or board.”

The California Supreme Court considered the application of this noninterest exception and read the exception to establish the following rule:

If the financial interest arises in the context of the affected official’s or employee’s role as a constituent of his or her public agency and recipient of its services, there is no conflict so long as the services are broadly available to all others similarly situated, rather than narrowly tailored to specially favor any official or group of officials, and are provided on substantially the same terms as for any other constituent.

(Lexin v. Superior Court (2010) 47 Cal.4th 1050, 1092.)

It has been stated that “[t]he phrase ‘public services generally provided’ is not self-defining, nor is there any useful legislative history that might shed light on the Legislature’s intent.” (*Lexin, supra*, at p. 1086.) “Public services generally provided” certainly include public utilities such as water, gas, and electricity. But qualifying “public services” are not limited to services provided to the general public or the public at large; “[p]ublic agencies provide many kinds of ‘public services’ that only a limited portion of the public needs or can use.” (92 Ops.Cal.Atty.Gen. 67, 70 (2009).)

The phrase “on the same terms and conditions” requires there be no special treatment of an official, either express or implied, because of that person’s status as an official. (*Lexin, supra*, at p. 1101.) Accordingly, the public services exception generally will *not* apply when provision of the service involves an exercise of discretion by the public body that would allow favoritism toward officials, or occurs on terms tailored to an official’s particular circumstances.⁴

⁴ *Lexin, supra* at 1088, 1100 at note 28; 88 Ops.Cal.Atty.Gen. at 128 (“discretionary or highly customized services” benefitting official would not come within “public services” exception), 92 Ops.Cal.Atty.Gen. at 71.

In *Lexin*, the Supreme Court determined that a pension benefit increase given to certain members of a city's retirement system, including several trustees on the public board that negotiated the increase and administered the system, was a noninterest under subdivision (a)(3), in that the trustees received the pension benefit on the same terms and conditions as other covered employees, without regard to their board membership, and with no special tailoring or individualized consideration. (*Lexin, supra*, at p. 1099.) The Court noted that, while individual employees' actual benefits might vary, the same formula for calculating the benefits--which took into account factors such as salary, length of service, and age--would be applied to all. (*Id.* at 1100; *cf. id.* at 1089 n. 18.)

In regard to the Make-Whole Remedy, the proposed remedy is comparable to the pension benefit increase examined in *Lexin* and has already been made available to all of the other approximately 4,000 current City employees. The one notable difference is that nonrepresented employees have not been provided the 7% interest payment that was provided to the represented employees. However, in regard to this difference, the Group A Councilmembers will be treated in the same manner as other nonrepresented employees and will not be offered the interest payment. Based on these facts, there is no exercise of discretion that would allow favoritism towards the councilmembers or terms tailored to the councilmember's circumstances. Accordingly, the noninterest exception to Section 1090 for "public services generally provided" as set forth under Section 1090.5(a)(3) would apply so that Councilmembers von Wilpert, Campillo, Elo-Rivera, LaCava, Campbell, and Whitbum would be permitted to vote to extend PERB's Make-Whole Remedy to themselves.

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

Sincerely,

Dave Bainbridge
General Counsel

Zachary W. Norton

By: Zachary W. Norton
Senior Counsel, Legal Division

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