



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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September 20, 2022

Paul M. Sampietro, CPA
Assistant Treasurer Tax Collector
County of Tulare
221 S. Mooney Blvd., Room 104-E
Visalia, CA 93291

Re: Your Request for Advice
Our File No. A-22-093

Dear Mr. Sampietro:

This letter responds to your request for advice 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.

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 Tulare 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

Does Section 1090 prohibit the Board of Trustees for the Tulare County Employee Retirement Association ("TCERA") from hiring you as the Assistant Retirement Administrator, where you are currently employed as the Assistant County Treasurer, and in that role have acted as an alternate ex-officio member of the TCERA Board?

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

No. Because you were removed from your alternate ex-officio duties prior to any discussion by the Board regarding the position and did not previously discuss the position with any of the Board's trustees, Section 1090 does not prohibit the Board from entering an employment contract with you for the Assistant Retirement Administrator position.

FACTS AS PRESENTED BY REQUESTER

You are currently employed as the Tulare County ("County") Assistant County Treasurer, a position you have held for the past four and a half years. As part of this position, you have been an alternate ex-officio trustee of the TCERA Board on behalf of the County Treasurer. In this ex-officio trustee role, you take part in discussions surrounding Board decisions. However, you only vote in your alternate ex-officio status when the County Treasurer is not present. You were not additionally compensated for your role on the Board as it was part of your position as Assistant County Treasurer.

The TCERA is governed by the Retirement Administrator, a CEO type position, with oversight from the TCERA Board. You recently learned that the Assistant Retirement Administrator will be retiring in November of this year. You informed the Retirement Administrator that you intend to apply for the paid position once it is opened. You did not discuss the position with the TCERA Board. The Retirement Administrator provides input in the hiring process, but the Board makes the ultimate decision.

On September 6, 2022, you provided follow up information by email that the Board discussed the position at their most recent meeting on August 24th. However, the County Treasurer removed you as an alternate ex-officio trustee on the Board at the beginning of the meeting, prior to any discussion. You were not present at all at this meeting. You are no longer an alternate ex-officio trustee on the Board.

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.) A contract that violates Section 1090 is void, and the prohibition applies 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.)

Section 1090 reaches beyond the officials who participate personally in the actual execution of the contract to capture those officials who participate in any way in the making of the contract. (*People v. Sobel* (1974) 40 Cal. App.3d 1046, 1052.) Therefore, participation in the making of a contract 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.)

Notably, when members of a public board, commission or similar body have the power to execute contracts, each member is conclusively presumed to be involved in the making of all contracts by his or her agency regardless of whether the member participates in the making of the contract. (*Thomson v. Call*, supra at pp. 645 & 649; *Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201; 89 Ops.Cal.Atty.Gen. 49 (2006).) As a general rule, when Section 1090 is applicable to one member of a governing body of a public entity, the entire governing body is precluded from entering the contract. (*Stigall*, supra, at p. 569.) When considering whether there has been a violation of Section 1090 in this type of situation, two issues arise, first whether there is a violation through participation where the employee is prohibited from entering a contract under Section 1090 if the employee participated in making the contract in their official capacity; second, whether there is presumed participation because the employee is a member of the board making the contract. (*Fraser*, supra, at p. 211-212.)

Here, you are not participating in the employment contract through your official capacity as Assistant County Treasurer, as there are no facts to suggest this falls within your duties in that capacity. Instead, the focus is on your role as an alternate ex-officio trustee on the TCERA Board. The primary issue here is whether your membership on the Board means that for purposes of Section 1090, you have participated in the making of the employment contract. Because of presumed participation noted above, any Board member would be prohibited from entering this employment contract, including you. However, the facts indicate that the County Treasurer removed you as an alternate ex-officio trustee prior to any action taken by the Board regarding the employment contract. This removal resulted in you no longer being a member of the Board and is more akin to a resignation than a recusal as you have no further duties with the Board.

In this case, the Board did not take any action regarding the position while you were in the role of an alternate ex-officio member. Previously we have advised that where a City Council had yet to engage in any action concerning the selection of a new Police Chief, a City Council member could still apply for the position if he resigned prior to the Council commencing any action toward the employment contract. (See *Perdock* Advice Letter, No. A-17-265.) While council members are presumed to be participating in any contract before the city, we did not find that this presumption applies when a councilmember resigns prior to any action taken in the making of the contract. (*Ibid.*). Because you were removed from the Board prior to any action concerning the pending vacancy and did not discuss the position with the Board, you are not presumed to have participated in the making of the employment contract and Section 1090 will not prohibit your employment in the position.

In *Perdock*, the council member had told the city manager of his intent to apply for the position, similarly to you informing the Retirement Administrator of your intent to apply for the position in this case. (*Ibid.*) However, this was not found to be participation in making the contract in *Perdock*. In this case, while you informed the Retirement Administrator of your intent to apply for the position, you were removed from your position prior to the Board's discussion of the position, did not discuss the position with a member of the Board, and did not use your current employment as Assistant County Treasurer to improperly participate in the making of the contract. Under these circumstances, merely informing the Retirement Administrator of your intent to apply

is not sufficient action to constitute participation in the employment contract. Accordingly, Section 1090 does not prohibit the Board from hiring you for the position at their discretion.²

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

Sincerely,

Dave Bainbridge
General Counsel

By: 
Valerie Nuding
Counsel, Legal Division

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² We note that this conclusion is dependent on the fact you left the Board prior to the Board's discussion about the new position. We have previously determined that Section 1090 prohibits hiring a board member who has previously expressed interest in the position, notwithstanding the board member recusing himself from any further decisions. (See *Cole* Advice Letter, No. A-22-021.)