



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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October 21, 2019

Karin Schwab
Placer County Counsel
175 Fulweiler Ave
Auburn, CA. 95603

Re: Your Request for Advice
Our File No. A-19-193

Dear Ms. Schwab:

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 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 Section 1090, may the Placer County Board of Supervisors appoint a Supervisor's spouse to the position of Director of Child Support Services, given that the spouse currently serves as the Assistant Director of Child Support Services?

CONCLUSION

No. The Board of Supervisors may not appoint the Supervisor's spouse as Director, because a Supervisor has a financial interest in his or her spouse's income under Section 1090, and no exception to Section 1090 is applicable given the circumstances.

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.

FACTS AS PRESENTED BY REQUESTER

Tamara Uhler, the Placer County Assistant Director of Child Support Services ("Assistant Director"), is married to Kirk Uhler, a member of the Placer County Board of Supervisors. Assistant Director Uhler's service began in July of 2009, after Supervisor Uhler was elected to the Board of Supervisors. The Assistant Director reports to the Director of the Department of Child Support Services ("Director"). The Assistant Director position is an at-will, unclassified management classification, with no written employment contract. An appointment to the Assistant Director classification was completed by the Department Head pursuant to County Code, and no confirmation or affirmative action from the Board of Supervisors was required.

The Director position is currently vacant. Assistant Director Uhler has informed the Placer County Counsel and the Director of Human Resources that she intends to apply for the position. The Director, a County Department Head classification, is an at-will appointment and there is no employment contract. The Director reports to the County Executive Officer ("CEO").

The California Family Code requires the Board of Supervisors to select the Director. Appointment of the prior Director was made by the Board on June 12, 2007. Pursuant to the Placer County Charter, the CEO is responsible for the appointment, suspension or removal of all appointive department heads except County Counsel, "subject to confirmation by the Board of Supervisors." Similarly, the Placer County Code identifies the CEO as appointing authority for all department heads other than elective officials "[e]xcept as specifically provided elsewhere"

The Board has routinely been involved in the appointment of department heads in the past, albeit not consistently through the years. As noted above, and as evidenced by the Board agenda summary of June 12, 2007, the prior Director was considered by the Board in closed session and his appointment was reported.

ANALYSIS

Section 1090 provides that "[m]embers of the Legislature, state, county, district, judicial district, and city officers or employees 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. Taft* (1962) 58 Cal.2d 565, 569.) Section 1090 is intended "not only to strike at actual impropriety, but also to strike at the appearance of impropriety." (*City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, 197.)

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. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.) The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Id.* at pp. 646-649.) A contract is typically "made" on mutual assent of the involved parties. (*Stigall, supra*, at p. 569.) "[T]he case law makes clear that section 1090 should be construed broadly to ensure that the public has the official's 'absolute loyalty and undivided allegiance.'" (*People v. Superior Court (Sahlolbei)* (2017) 3 Cal.5th 230, 239.) California courts "have held that the 'making' of a contract

for the purposes of section 1090 includes 'planning, preliminary discussions, compromises, drawing of plans and specifications and solicitation of bids,' and not just the moment of signing." (*Ibid.*) California courts "have similarly interpreted 'financial interest' broadly so as to include indirect interests and future expectations of profit or loss." (*Ibid.*)

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 actually 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).)

In determining whether a financial interest exists under Section 1090, courts "generally focus on whether the contract in question could confer some type of pecuniary advantage to the target of a Section 1090 inquiry." (*Eden Township Healthcare District v. Sutter Health* (2011) 202 Cal.App.4th 208, 225.) Whether a proscribed financial interest exists in a public contract is primarily a question of fact. (*People v. Vallerga* (1977) 67 Cal.App.3d 847, 865.)

An official has an interest in the community and separate property income of his or her spouse. (*Thorpe v. Long Beach Community College Dist.* (2000) 83 Cal.App.4th 655; 89 Ops.Cal.Atty.Gen. 69 (2006).) A member of a board or commission always has a financial interest in his spouse's source of income for purposes of Section 1090. (78 Ops.Cal.Atty.Gen. 230, 235 (1995).) A married official "stands in the shoes of his [or her] spouse." (89 Ops.Cal.Atty.Gen. 258, 264 (2006).)

Here, a Supervisor's spouse intends on applying for the Director position and the California Family Code requires the Board of Supervisors to select the Director. You have noted that the Director position "is an at will appointment and there is no employment contract." However, the Attorney General has concluded that "public employment constitutes a 'contract' within the meaning of Government Code section 1090." (65 Ops.Cal.Atty.Gen. 305, 308, fn. 4 (1982); see also 36 Ops.Cal.Atty.Gen. 121, 122 "[I]n accordance with the many cases which state that public employment does admit certain contractual relationships, it is our conclusion that the offer by the appointing official and the acceptance by the appointee of employment do constitute the making of a contract, the terms and conditions of which are fixed by law. Since the appointment constitutes the making of a contract, section 1090 is applicable."].)

Thus, while there may be "no contract" in the sense that there would not be a formal written agreement that the Director may only be fired for-cause, a contract would still exist for purposes of Section 1090, given that the Board of Supervisors would be offering, and the Assistant Director would be accepting, a position that would involve the payment of salary for performance of services. (See *White v. Davis* (2003) 30 Cal.4th 528, 566 "[A] number of cases have stated broadly that among the rights protected by the contract clause is 'the right to the payment of salary which has been earned.'") Because Supervisor Uhler would have a financial interest in the salary earned by Assistant Director Uhler if she were appointed to the Director position, the appointment would violate Section 1090 unless a statutory exception applied.

Based on the facts provided, statutory exceptions to Section 1090 set forth under Sections 1091 and 1091.5, which provide "remote interests" and "noninterests" respectively, do not apply.

Section 1091.5(a)(6) is the provision most relevant to the facts presented. Under this section, a public officer has a statutory noninterest in his or her spouse's employment "if his or her spouse's employment . . . has existed for at least one year prior to [the officer's] election or appointment." (See 69 Ops.Cal.Atty.Gen. 255 (1986) [explaining that Section 1091(a)(6) requires one year or more in the same employment.]) Section 1091.5(a)(6) applies to a spouse who maintains status quo employment for over one year, but does not apply to changes in employment status beyond mere restructuring of a current position. (*Thorpe, supra*, 83 Cal.App.4th at p. 664.) Changes such as "a pay increase . . . a new title, a new job description, substantial additional duties, and movement from a classified position in a bargaining unit to a supervisory position without a bargaining unit" indicate new employment to which the noninterest exception established under Section 1091.5(a)(6) does not apply. (*Id.*) Because appointment to the Director position would not maintain the status quo of Assistant Director Uhler's employment, Section 1091.5(a)(6) does not apply.

Because the appointment of Assistant Director Uhler to the Director position would violate Section 1090, the Board may not appoint her to the position while Supervisor Uhler serves on the Board.

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

Sincerely,

Dave Bainbridge
General Counsel



By: Counsel, Legal Division

KMC:aja