



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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April 4, 2022

Derek P. Cole
Cole Huber LLP
2281 Lava Ridge Court, Suite 300
Roseville, CA 95661

Re: Your Request for Advice
Our File No. A-22-021

Dear Mr. Cole:

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 Calaveras 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 Calaveras Council of Governments ("CCOG") from hiring current Board member Justin Catalano as its Executive Director after he took part in a closed session meeting where the Board discussed recruitment of a permanent Executive Director and he expressed interest in the position during the meeting?

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. As explained below, even if Board member Catalano first resigns from his position, Section 1090 prohibits the CCOG Board from hiring him as its Executive Director.

FACTS AS PRESENTED BY REQUESTER

You are Interim General Counsel for Calaveras Council of Governments (“CCOG”) seeking this advice on behalf of Justin Catalano, a citizen member of the CCOG. CCOG is a Regional Transportation Planning Agency (“RTPA”) with two members from the Angels Camp City Council, two members from the Calaveras County Board of Supervisors, and three citizen board members. A primary responsibility of the CCOG is to administer the Transportation Development Act. (See <https://calacog.org>.)

Following the announcement of the former Executive Director’s resignation, the CCOG Board held a closed session in February to discuss the appointment to fill the vacancy. Mr. Catalano was part of the closed session meeting. At that meeting, the Board decided on an individual to hire as an Interim Director until it put out a recruitment offering for the permanent Executive Director position. During the discussion concerning the interim position, Mr. Catalano stated to the other Board members that he might be interested in the permanent position. The Board decided to put three of the members in charge of looking over the applications to recommend the best candidate for the position. As a citizen Board member, Mr. Catalano is entitled to vote on the Executive Director position.

A recruitment offering was put together by CCOG staff to be approved by the Board at a subsequent meeting that Mr. Catalano did not attend. He has not had any conversations with Board members since the closed session in February.

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. 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.)

Typically, a contract is “made” on mutual assent of the involved parties. (*Stigall, supra*, at p. 569.) In addition, making or participating in making a contract has been broadly construed to include those instances where a public official has influence over the contract or its terms. (See 80 Ops. Cal. Atty. Gen. 41.)

Importantly, 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).)

Here, the CCOG Board, including Mr. Catalano, has the authority to hire an individual for the Executive Director position. As a current member of the Board, Board member Catalano would not be able to enter into an employment agreement with CCOG for this position even if he did not participate in the hiring decision because he is “conclusively presumed to be involved in the making of all contracts” by the Board. Therefore, Section 1090 prohibits him from entering a contract with the CCOG for the Executive Director position while serving as a member of its Board.

The next issue is whether he would be able to first resign from the Board and then be hired by the CCOG for the Executive Director position. Section 1090 reaches beyond the officials who actually execute the contract and courts have broadly interpreted “participation in the making of a contract” when applying the section:

The decisional law, therefore, has not interpreted section 1090 in a hypertechnical manner, but holds that an official (or a public employee) may be convicted of violation no matter whether he actually participated personally in the execution of the questioned contract, if it is established that he had the opportunity to, and did, influence execution directly or indirectly to promote his personal interests. (*People v. Sobel* (1974) 40 Cal.App.3d 1046, 1052.)

Thus, “participation in the making of a contract” is defined broadly and includes any act involving the planning, preliminary discussions, negotiations, compromises, reasoning, 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; see also *Stigall v. City of Taft, supra*, at p. 569.)

Pursuant to Section 1090, leaving public employment may not avoid a Section 1090 violation when the person has been involved in the contract process. In *City Council v. McKinley* (1978) 80 Cal. App.3d 204, 212, the court stated:

If the date of final execution were the only time at which a conflict might occur, a city councilman could do all the work negotiating and affecting a final contract which would be available only to himself and then present the matter to the council, resigning his office immediately before the contract was executed. He would reap the benefits of his work without being on the council when the final act was completed. This is not the spirit or the intent of the law which precludes an officer from involving himself in the making of a contract.

In *Finnegan v. Schrader* (2001) 91 Cal.App.4th 572, a board member of a sanitary district was appointed to the position of District Manager after he resigned from the board. He announced

at a board meeting that he was interested in the position and, at a later meeting, distributed a statement of his qualifications. The board offered him the position to be effective upon his resignation. The court held that his appointment to the District Manager position violated Section 1090.

Similarly, the Attorney General's Office has opined that county employees could not propose an agreement for consulting services, then resign, and provide the proposed services (66 Ops.Cal.Atty.Gen. 156 (1983)) and a council member could not participate in the establishment of a loan program and then leave office and apply for a loan (81 Ops.Cal.Atty.Gen. 317 (1998).)

Finally, in the *Burns* Advice Letter, FPPC No. A-15-096, the board of a joint powers authority appointed a search committee to find a replacement for the Executive Director who had recently announced her retirement. Soon thereafter, a member of the search committee advised a member of the board that he had been suggested for the position. The board member resigned six weeks later. We advised that the board member had participated in the making of the employment agreement, and that Section 1090 prohibited him from taking the Executive Director position. (See also *Montoy* Advice Letter, No. A-15-165 [city council member could not resign from office and then be hired as the city manager because he is deemed to have participated in making the employment contract under Section 1090]; *Larivee* Advice Letter, No. A-19-166.)

In all of these matters, Section 1090 prohibited an official from participating in the making of a contract and attempting to enter the contract after resigning from office. Here, Board member Catalano was present at a closed session meeting in February where the Board decided on an individual to hire as an Interim Director, discussed the appointment to fill the permanent position, and put three of its members in charge of looking over applications to recommend the best candidate. At the meeting, Mr. Catalano stated to the other Board members that he might be interested in the permanent position.²

Based on these facts and the authority cited above, we find that Board member Catalano participated in the making of the employment agreement concerning the CCOG Executive Director position; Section 1090 therefore prohibits him from entering into an agreement with the CCOG for that position even if he first resigns from his current position as a CCOG Board member.

² We express no opinion as to the permissibility of your previous communications to the board under the conflict of interest provisions of the Political Reform Act, which prohibits an official from making, participating in making, or using his or her official position to influence a governmental decision in which he or she knows or has reason to know they have a financial interest.

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

Sincerely,

Dave Bainbridge
General Counsel

By: *Jack Woodside*
Jack Woodside
Senior Counsel, Legal Division

JW:aja