



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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Megan N. Crouch
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111 E 7th Street
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Re: Your Request for Advice
Our File No. A-25-088

Dear Ms. Crouch:

This letter responds to your request for advice on behalf of the City of Lindsay 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. Finally, the Commission is not authorized and does not provide advice concerning past conduct. (Section 1097.1(c)(2) and Regulation 18329(b)(6)(A).) Therefore, nothing in this letter should be construed to evaluate any conduct that may have already taken place, and any conclusions contained in this letter apply only to prospective actions.

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 the Attorney General's Office, and received a general response from the Tulare County District Attorney's Office indicating that they await the independent assessment of the Commission. (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).)

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.

QUESTION

Does Section 1090 prohibit the City Manager from hiring the spouse of a City Councilmember as the Chief of Police, where the City charter vests the independent authority to hire department heads with the City Manager?

CONCLUSION

No. Because the City Council is not required to review or approve the hiring decisions that are vested solely with the City Manager, Section 1090 does not prohibit the City from entering into the employment agreement, so long as the Councilmember completely refrains from participating in making the agreement in her official capacity.

FACTS AS PRESENTED BY REQUESTER

The City's current police chief has resigned. Lieutenant Nicholas Nave, who has been with the Department for 20 years, is under consideration for the Police Chief position, officially titled "Director of Public Safety." However, he is married to Councilmember Adriana Nave, who was elected as a City Councilmember in November. You also state that he is currently the Interim Police Chief, as he was the only one able to take on the role after the previous Chief left unexpectedly.

The City Council has no appointment authority for the Chief of Police; it entirely falls with the City Manager. The City Manager has full authority over the appointment of the position. The Lindsay Municipal Code states:

Section 2.20.010 Director; Appointment And Powers

There is created and established the position of director of public safety who shall be appointed by the city manager as provided in Section 7.02 of the Lindsay City Charter. The director of public safety is empowered and authorized to appoint deputies and support assistants as he deems necessary for the proper and efficient, operation of the department of public safety, subject to the City Charter, municipal code and the city budget.

The referenced section from the Lindsay City Charter states:

Section 7.02 Department Heads.

A. Appointment. The City Manager shall appoint a department head for each department, which person shall be qualified in the field of expertise encompassed within the assigned department.

B. Removal. All department heads shall serve at the pleasure of the City Manager and be subject to his/her direction.

You also state that the Council's only authority is to approve the Director of Public Safety's budget and salary schedule.

ANALYSIS

Section 1090

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.)

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 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).) Generally, Section 1090 prohibits a contract where decision-making authority is merely delegated to a city manager or other official. (See 87 Ops.Cal.Atty.Gen. 9 (2004) [finding that delegation of authority to a school district superintendent to contract on behalf of the district did not avoid a Section 1090 conflict]; Schwab Advice Letter, No. A-19-193 [advising county board of supervisors could not appoint supervisor’s spouse to the position of director of a county department].) However, in limited circumstances, when another city official has been granted independent authority under the agency’s enabling statute or ordinance, a Section 1090 violation can be avoided so long as the city council has no other involvement in the contract.

For instance, an Attorney General opinion found that a County Supervisor’s ownership in a business did not cause a violation of Section 1090 where a county employee has independent legal authority to approve transactions with the business. In that case, Alpine County wished to obtain towing services and service station supplies from a County Supervisor who owned the only service station in a certain area of the County to avoid having to obtain them elsewhere. (57 Ops.Cal.Atty.Gen. 458, 459 (1974).) The County Board of Supervisors had the authority to hire a County Purchasing Agent under Section 25500. (*Ibid.*) Section 25501 set forth the Purchasing Agent’s authority to make such purchases. (*Id.* at p.460.) The Opinion concluded that the County Purchasing Agent had independent authority to contract, and thus could execute a contract with the County Supervisor for goods or services without violating Section 1090 because the Board of Supervisors would not be participating in the making of the contract. (*Id.* at p. 460-61; see also 81 Ops.Cal.Atty.Gen. 274, 278 (1998) [finding no conflict under Section 1090 where the official with a potential interest is on a board that “is a separate body” that “has no role to play in the . . . hiring decisions” and, thus, is not involved in “making” the contract]; 21 Ops.Cal.Atty.Gen. 90, 92 (1953) [City Treasurer can deposit funds in a bank in which a City Council member was a stockholder and director. “The significant fact in each of these opinions is the independent status of the party contracting on behalf of the governmental agency.”].)

Turning to the facts presented, the question here is whether the City Manager has independent authority to enter into an employment contract with Lieutenant Nave, thus avoiding a Section 1090 violation because the City Council and, more specifically, Councilmember Nave would not be participating in the making of the contract. In this case, the City's Municipal Code sets forth the powers and duties of the City Manager, and clearly provides the independent authority under Municipal Code Sections 7.02 and 2.20.010 for the City Manager to hire department heads, including the Chief of Police. Based upon the facts provided, the City Manager possesses independent statutory authority, and are thus similar to those considered in the *Walter Advice Letter*, No. A-15-050, which concluded that a city manager with independent statutory authority to approve contracts without city council approval could approve a contract with a source of income to a council member, without violating Section 1090, as long as there was no involvement or oversight by the city.

Accordingly, Councilmember Nave and the City Council will avoid violating Section 1090 where the City Manager enters a contract with Lieutenant Nave to serve as the Chief of Police, without involvement or oversight by the City Council, pursuant to his or her authority under Section 34852 and Municipal Code Sections 7.02 and 2.20.010. However, we note that this conclusion is limited to the decision to appoint the Chief of Police and does not extend to any additional benefits or increase in the salary schedule for the position. In regard to any increase in salary, you have stated that the salary schedule is under the City Council's authority. Thus, the City Council would be prohibited from making any decisions to increase the existing salary of the Chief of Police. Likewise, because the City Manager does not have existing independent authority to determine the salary schedule for the position, the City would not be able to increase the salary of the position while Councilmember Nave serves on the council without violating Section 1090.

If you have other questions on this matter, please contact me at znorton@fppc.ca.gov.

Sincerely,

Dave Bainbridge
General Counsel

Zachary W. Norton

By: Zachary W. Norton
Senior Counsel, Legal Division

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