



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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June 22, 2015

Allison Burns
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Re: Your Request for Advice
Our File No. A-15-096

Dear Ms. Burns:

This letter responds to your request for advice regarding provisions of the Political Reform Act (the “Act”)¹ and Section 1090. Please note that we do not advise on any other area of law, including Public Contract Code or common law conflicts of interest. We are also 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.

QUESTION

May the Antelope Valley Transit Authority (the “AVTA”) hire Norm Hickling, a former AVTA board member, as its Executive Director?

CONCLUSION

No. Under Section 1090, he is deemed to have participated in making, and has a financial interest in, his employment contract and the contract would be void.

FACTS

You are the special counsel to the AVTA, a joint powers authority that operates a fleet of 73 buses serving the cities of Lancaster and Palmdale and unincorporated portions of northern Los Angeles County.

The AVTA is in the process of hiring a permanent Executive Directive. As part of that process, it has considered a number of interested candidates, including Norm Hickling, who previously served as a member of the AVTA board of directors and resigned on April 8, 2015. Mr. Hickling served on the board without compensation until his resignation.

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.

At the time that Mr. Hickling was a member of the AVTA board, the board appointed a committee to undertake a search for a permanent Executive Director. Mr. Hickling was not a member of the search committee. A member of the search committee has suggested Mr. Hickling as a possible candidate for the position.

ANALYSIS

CONFLICT OF INTEREST UNDER THE ACT

The Act does not prohibit an agency from employing a former member of the agency's board of directors. The Act's conflict-of-interest provisions apply to public officials making, participating in, or influencing governmental decisions that may have a material effect on their financial interests. Mr. Hickling will not be making or participating in future AVTA board decisions because he has left the AVTA board. Therefore, the conflict of interest prohibitions do not apply.

THE ACT'S POST-GOVERNMENTAL EMPLOYMENT PROVISIONS

Some former local officials who leave government service are subject to the Act's one-year ban for local officials in Section 87406.3. Generally, this restriction prohibits certain former local officials from communicating with their former agencies, for compensation and in representation of another person, for the purpose of influencing any legislative or administrative actions, including quasi-legislative and quasi-judicial actions, or any discretionary actions involving the issuance, amendment, awarding, or revocation of a permit, license, grant or contract, or the sale or purchase of goods or property. This section, which only applies when a public official leaves government service, does not prohibit or restrict Mr. Hickling's employment with the AVTA.

SECTION 1090 CONFLICT OF INTEREST

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.)

Section 1090 provides, in part, 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."

In relation to a public body, such as the AVTA's board of Directors, each member is deemed involved in the making of a contract by the body regardless of whether the member actually participates in the making of the contract. Therefore, as a member of AVTA, a joint powers authority, Mr. Hickling is subject to the prohibitions of Section 1090.

We next consider whether Mr. Hickling would violate Section 1090 by taking the Executive Director position and entering into a contract with the AVTA.² Section 1090 applies to officials who participate in any way in the making of the contract. The "making" of a contract has been interpreted to include planning, preliminary discussions, negotiations, compromises, reasoning, drawing of plans and specifications and solicitation for bids. (*City Council v. McKinley* (1978) 80 Cal.App.3d 204; see also *Stigall v. City of Taft* (*supra*)).

The question of when an official participates in "making" a contract where the final step of executing the contract occurs after the official's resignation has been considered by the courts and Attorney General Opinions.

The question was addressed in *City Council v. McKinley*, where 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 effecting 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." (*City Council v. McKinley*, *supra*, at p. 212.)

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.

In 81 Ops.Cal.Atty.Gen. 317 (1998) it was determined that a council member could not participate in the establishment of a loan program and then leave office and apply for a loan. Similarly, in 66 Ops.Cal.Atty.Gen. 156 (1983), the Attorney General's office advised that county

² General principles of contract law can be considered in determining whether a contract involves a contract (84 Ops.Cal.Atty.Gen. 34, 36 (2001);² 78 Ops.Cal.Atty.Gen. 230, 234 (1995)), while keeping in mind that "specific rules applicable to Sections 1090 and 1097 require that we view the transactions in a broad manner and avoid narrow and technical definitions of 'contract.'" (*People v. Honig*, *supra*, at p. 351 citing *Stigall*, *supra*, at pp. 569, 571.) Under general contract law, an enforceable contract is made when there has been an offer, an acceptance and consideration. An employment relationship involves an offer of employment and acceptance. Therefore, decisions regarding the employment of an Executive Director involve a contract.

employees could not propose an agreement for consultant services, then resign, and provide such consulting services.

The common fact of these cases and opinions is that the official resigned from office shortly after the official knew there would be a contract and then applied or bid on the contract.

Here, the AVTA's former Executive Director announced her retirement on January 6, 2015. On January 27, the board appointed a search committee. On February 23, a member of the search committee told Mr. Hickling that he had been suggested for the position by another member. Six weeks later, on April 8, Mr. Hickling resigned from the board. Under these facts, and based on the opinions above, we find that Mr. Hickling participated in the making of the employment agreement. Therefore, Section 1090 prohibits him from taking the Executive Director position and any related agreement would be void.

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

Sincerely,

Hyla P. Wagner
General Counsel



By: Valentina Joyce
Counsel, Legal Division

VJ:jgl