



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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September 29, 2023

Gary S. Winuk
Kaufman Legal Group
621 Capitol Mall, Suite 1900
Sacramento, CA 95814

Re: Your Request for Advice
Our File No. A-23-117

Dear Mr. Winuk:

This letter responds to your request for advice on behalf of Lynn Paquin regarding the post-government employment provisions of the Political Reform Act (“Act”) and Government Code Section 1090, et seq.¹ Please note that we are only providing advice under the Act and Section 1090. We do not provide advice under other general conflict of interest prohibitions, such as common law conflict of interest, including the Public Contract Code.

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 Sacramento 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

Is Ms. Paquin prohibited from employment as a California State Teachers’ Retirement System (“CalSTRS”) Portfolio Manager due to her past participation as the State Controller’s delegate or “Alternate” CalSTRS Board member in CalSTRS Board decisions affecting the compensation for the CalSTRS Portfolio Manager position and her general discussions with

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.

CalSTRS staff and board members regarding a future interest in employment at CalSTRS while she was a CalSTRS Board member?

CONCLUSION

No. Neither the post-government employment provisions, the prohibition on influencing prospective employment, one-year and permanent ban, nor the post-CalSTRS Board member 2-year, 4-year, and 10-year bans limit her ability to seek employment with the state agency CalSTRS as a Portfolio Manager as these bans are not applicable where the future employment is with a state agency.

Additionally, Section 1090 does not prohibit her from seeking this employment and entering into the contract because she did not participate, personally or presumptively as a CalSTRS Board member, in any decisions or actions related to the position for which she would like to apply in the future. The position was not vacant at the time she was leaving office, and she only generally discussed her future interest in this type of position with staff. Further, the CalSTRS Board did not take any action regarding the Portfolio Manager position during her membership other than its compensation decisions general to the Portfolio Manager series.

However, we caution that Section 1090 may prohibit Ms. Paquin from contracting for employment in a specific position in which the CalSTRS Board played a role in the hiring process or employment terms in a specific vacant or upcoming vacancy during her membership. To the extent Ms. Paquin wishes to seek employment in a specific position created by the CalSTRS Board during her membership, such as the Senior Investment Director and the Senior Portfolio Manager positions, she should seek further assistance.

FACTS AS PRESENTED BY REQUESTER

Before her resignation, effective July 7, 2023, Lynn Paquin served as the Deputy State Controller, Investments and Financial Management, at the State Controller's Office. During this work, she served as an Alternate Board Member on the CalSTRS Board for the State Controller. Former State Controller Yee appointed Ms. Paquin as her "delegate" to the CalSTRS Board in September 2015, and she continued to serve in that role for current State Controller, Malia Cohen, until July 7, 2023.

As the Controller's delegate, Ms. Paquin reviewed the CalSTRS Board agenda material, prepared briefing memos for the Controller, reviewed the relevant Board information with the Controller, and then represented the Controller's views at the CalSTRS Board meetings, including voting on agenda items.

The CalSTRS Board has salary-setting authority for investment office positions within the agency, starting with assistant portfolio managers and higher. (Ed. Code section 22212.5(a), "Compensation for specified investment officers and portfolio managers".) This includes the Chief Executive Officer ("CEO"), Chief Operating Officer ("COO"), Chief Financial Officer ("CFO"), Senior Actuaries, Chief Investment Officer ("CIO") and Chief Counsel. These positions, except the Chief Counsel, include a formula-based annual incentive which is also approved by the Board.

Ms. Paquin would now like to apply for a Portfolio Manager position at CalSTRS, when a position becomes available for which she is qualified. Currently, CalSTRS has over 35 Portfolio Managers in the investment office. Ms. Paquin had no involvement in the hiring process for the Portfolio Manager positions.

You provide the following instances where, in her role as an Alternate CalSTRS Board member, Ms. Paquin was involved in decisions affecting the compensation for the CalSTRS Portfolio Manager position and the creation of the two other positions:

- April 2017 CalSTRS Compensation Committee: Ms. Paquin voted to approve a 5 percent pay increase for the Portfolio Manager salary range at the meeting. You note that the pay increase was based on a labor market analysis prepared by McLagen Partners.
- May 2019 CalSTRS Board: Present on behalf of Controller Yee, Ms. Paquin voted to approve the Compensation Committee's recommendation to increase the incentive range for investment office positions at the meeting. (Controller Yee did not sit on the Compensation Committee and did not vote on this item at the committee level.)
- November 2020 CalSTRS Board: Controller Yee personally was present at the meeting and voted on the creation of two new investment office positions – Senior Investment Director and Senior Portfolio Manager – along with the salary and incentive ranges. Ms. Paquin was not present at this meeting and did not vote on this item.
- June 2021 CalSTRS Board: Controller Yee was personally present and voted on GGA proposed long-term incentive plan option for investment positions. The CalSTRS Board declined to take action on that issue and deferred it to a later date. on this item.

In response to our request for additional information regarding any communications Ms. Paquin may have had regarding her future interest in seeking employment as a Portfolio Manager at CalSTRS, you provided the following: it is common for an appointed senior staff to leave her position once her elected boss' term ends. As Controller Yee's term came to a close, some CalPERS and CalSTRS staff and board members asked Ms. Paquin about her plans and whether she had any general interest in working at their organizations, given her deep knowledge of pension issues. She had a few preliminary discussions with CalSTRS staff about general areas of interest. She did not have a conversation with any board members or staff regarding a specific position opening in the portfolio manager series. There were no openings for the position of Portfolio Manager at the time she was leaving the CalSTRS board. Nor has there been an opening that fits her skill set since she left. You further note that while there have been Portfolio Manager positions posted at CalSTRS over the past year, the specific scope of those positions did not match her interest and background. She did not apply for these positions.

You noted that the positions in the Portfolio Manager series are mid-level civil service positions² and cover a broad range of investment types. Ms. Paquin does not have the appropriate experience for all of the series. While she did not apply for an existing job opening in the Portfolio Manager series, Ms. Paquin expressed her interest in potentially applying for a position in the future. She then consulted with the CalSTRS Chief Counsel to ensure she complied with state law.

You provided additional information regarding the CalSTRS Board's authority and role in regard to hiring in general and specific to the Portfolio Manager positions. All CalSTRS staff are civil servants with the exception of the CEO, who is appointed by the Board under Ed. Code section 22209. You state that the CalSTRS Board has "a say" in the hiring of the CIO, a civil service position. For the CEO and CIO positions, the CalSTRS Board works with its governance consultant to establish a search committee and hiring process.

Additionally, you note that Ed. Code section 22212.5(c) states that the investment officer positions, including the Portfolio Manager, are filled through a civil service appointment from an eligible list, subject to CalSTRS Board actions regarding an employee's performance failure:

(c) When a position specified in subdivision (a) is filled through a general civil service appointment, it shall be filled from an eligible list based on an examination that was held on an open basis, and tenure in those positions shall be subject to the provisions of ["Tenure of Managerial Employees" provisions in Sections 19590-19593]. In addition to the causes for actions specified in that article, the board may take action under the article for causes related to its fiduciary responsibility to its members, including the employee's failure to meet specified performance objectives.

You state that given the number of positions for the investment office, which includes 38 Portfolio Managers and 40 Associate Portfolio Managers, "[o]n a practical level, no Board would be involved in the hiring process of the Portfolio Manager position, which is pretty far down in the investment office organizational chart."

Additionally, you state that the CalSTRS Board does not make hiring decisions for the Portfolio Manager position. All the positions in the Portfolio Manager series are filled through the state civil service process. The CalSTRS Board does not establish a search committee or conduct interviews for these positions. The CalSTRS Board is not told who the candidates are and how they are ranked, nor do they sit on interview panels. The CalSTRS Board has not previously been and is not generally involved in the hiring process for any other position, other than the CEO and CIO positions noted above.

² You further state that because of its category as civil service positions, all vacancies in this series are posted through the CalSTRS Human Resources Division. Once the job applications are received, the CalSTRS Human Resources Division determines each job applicant's eligibility and then ranks qualified applicants based on a score determined by the CalSTRS Human Resources Division staff on an eligibility list used for hiring.

ANALYSIS

The Act

The Act places certain restrictions on post-government employment in the form of “one year” and “permanent” bans that limit the circumstances in which former government officials may communicate with their former agency for compensation, or “switch sides” and work for a private employer on a proceeding the former official worked on while employed by their former agency. (See Sections 87400-87402, 87406.) Government officials while still employed are also prohibited from taking actions to influence prospective employment (See Section 87407.) Additionally, more specific restrictions of varying lengths are placed on post-government employment by former CalSTRS board members. (See Sections 87408-87410.)³

With respect to each of the restrictions mentioned above, application is premised and dependent on post-government employment. In other words, none of these restrictions apply where the official leaves a state position and seeks or takes employment at another state agency. Accordingly, none of the Act’s post-employment provisions apply to Ms. Paquin seeking employment with CalSTRS, because it is a state agency.

Section 1090

Generally, Section 1090 prohibits public officers, 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.)

³ CalSTRS Four-Year Ban: prohibits a CalSTRS Board member for a period of four years after leaving that office or position, from acting, for compensation, as an agent or attorney for, or otherwise representing, any other person, except the state, by making a formal or informal appearance before, or an oral or written communication to, the CalSTRS, or an officer or employee thereof, if the appearance or communication is made for the purpose of influencing administrative or legislative action, or influencing an action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property. (Section 87408.)

CalSTRS Two-Year Ban: prohibits a CalSTRS Board member for a period of two years after leaving that position from aiding, advising, consulting with, or assisting a business entity in obtaining a contract or contract amendment with CalSTRS for compensation. (Section 87409(b).)

CalSTRS Ten-Year Ban: prohibits a CalSTRS Board member from accepting compensation to serve as a “placement agent” in connection with investments or other business before either the California State Public Employees’ Retirement System (CalPERS) or CalSTRS. (Section 87410(b).) A “placement agent” is an individual hired by an investment fund’s external manager to act as a finder, solicitor, marketer, consultant, broker or other intermediary in connection with the offer or sale of either securities or investment management services to a state public retirement system in California. (Section 82047.3.)

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 contract terms are fair and equitable to all parties. (*Id.* at pp. 646-649.)

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 their 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).) Therefore, under Section 1090, Ms. Paquin is “conclusively presumed to be involved in the making of all contracts” by the CalSTRS Board during her time as a member, even if she did not actually participate in the decision.

A threshold issue is whether the CalSTRS Board has the power to execute the employment contract at issue. The CalSTRS Board has the authority to set compensation rates for the Portfolio Manager positions and to act in regard to the employee’s tenure under Ed. Code section 22212.5(a) and (c). It additionally has the authority to “appoint such employees as are necessary to administer the plan and the system.” (Ed. Code section 2228.) In light of this authority, we find that the CalSTRS Board has the ultimate authority to execute Portfolio Manager employment contracts, even though it may not customarily engage in the practice and the position is a civil service position filled under applicable state service requirements.

Next, we consider whether Ms. Paquin may enter into an employment contract with CalSTRS, following her CalSTRS Board membership, where the Board engaged in a compensation decision regarding the Portfolio Manager class of positions, and she engaged in general discussions with CalSTRS staff regarding her future interest in this type of position.

“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. Taft, supra*, at p. 569. Past advice letters have examined whether a board has engaged in actions that constitute “participation” in an employment contract to determine if Section 1090 prohibits the board member from resigning office and entering into a contract for the position. In *Perdock* Advice Letter, No. A-17-265, we advised that the councilmember may resign and be considered for a chief of police position, anticipated to be vacant upon the retirement of the current chief, where the city council had not taken any action concerning the selection of a new chief. Specifically, the letter noted that the council had yet to engage in any of the planning, preliminary discussions, negotiations, compromises, reasoning, drawing of plans and specifications, and solicitation for bids that would ordinarily be involved in the making of a contract.

In *Hinton* Advice Letter, A-23-015, we advised that the mayor could not resign and be considered for the city manager position where the city council had already taken actions to fill the position. Specifically, the council determined at a closed session meeting that it was necessary to establish a subcommittee to begin the recruitment process for the position, the mayor set the matter as a public agenda item, and the mayor was assigned to the subcommittee (although he resigned before it had taken any official action).

Here, the Portfolio Manager position at issue was not open during her service as a CalSTRS Board member, nor at the time she left her board position. The facts indicate that the CalSTRS Board took no action during the time of Ms. Paquin's membership related to the specific position, other than to set compensation levels for the class of positions. While on the CalSTRS Board, Ms. Paquin had "a few preliminary discussions about general areas of interest" in working at CalSTRS with its staff and board members. She did not have a conversation with any board members or staff regarding a specific position opening in the Portfolio Manager series.

Based on the facts presented, we advise that Ms. Paquin's CalSTRS Board membership will not prohibit her ability to seek employment in the future as a Portfolio Manager when a position becomes vacant because the CalSTRS Board did not participate in actions or discussions related to the specific employment position at issue, nor did she act to influence such an employment contract or its terms.

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

Sincerely,

Dave Bainbridge
General Counsel

L. Karen Harrison

By: L. Karen Harrison
Senior Counsel, Legal Division

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