



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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September 25, 2023

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

Re: Your Request for Advice
Our File No. A-23-126

Dear Mr. Winuk:

This letter responds to your request for advice on behalf of Port of San Diego, Board of Port Commissioner Rafael Castellanos 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, 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 San Diego 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).)

QUESTIONS

Does Section 1090 prohibit Chair Castellanos of the Port of San Diego's Board of Port Commissioners ("Port District Board" or "Board") from being hired by the San Diego Unified Port District ("Port District") as its Chief Executive Officer ("CEO"), or for any other position, if he resigns from office before the commencement of the Board's hiring process or if he does not participate or attempt to influence any decisions regarding a vacancy?

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.

CONCLUSIONS

1. Section 1090 prohibits the Board from entering into an employment contract with Chair Castellanos while he is a member of the Board. Recusal from participation in the decision-making process is insufficient to avoid a violation because under Section 1090 a member of a governing board is presumed to have participated in any decision by the board. Specific to the CEO position, Section 1090 will prohibit the contract to the extent that the Board makes or considers the making of a CEO contract in any manner prior to Chair Castellanos' resignation.

2. In the event Chair Castellanos resigns from the Board, he may only enter into contract for employment with the Board to the extent that the Board has not considered the employment contract during his Board membership, and he has not taken action to influence the making of the contract to promote his personal interest during his Board membership. Specific to the CEO position, we advise based on the limited facts disclosed that the Board's actions to date: placing the current CEO on leave, engaging in litigation regarding this employee, and hiring an interim CEO, do not meet the level of "participation in the making" of a future CEO employment contract. Additionally, it does not appear that Chair Castellanos has otherwise acted to influence the making of a future CEO contract to promote his personal financial interest in the position. We caution that any undisclosed or further action toward the purpose of hiring a new CEO could constitute preliminary activities toward making a contract which would prevent Chair Castellanos from obtaining the CEO position, whether or not he participated. Therefore, at this time, Section 1090 would not prohibit a Board contract for the CEO position with Chair Castellanos following his resignation.

FACTS AS PRESENTED BY REQUESTER

The Port District is a specially created public district that manages San Diego Bay and 34 miles of waterfront. The Port District was established in 1962 and has five member cities: Chula Vista, Coronado, Imperial Beach, National City, and San Diego. Management of the Port District is entrusted to the Port District Board, which has seven appointed commissioners (Board members"). One Board member is appointed by each of the city councils of Chula Vista, Coronado, Imperial Beach and National City, and three by the City of San Diego. The Port District Board establishes policies under which the Port's staff — supervised by the Executive Director/President/Chief Executive Officer ("CEO") — conducts its daily operations.

Chair Castellanos was appointed to the Board in April 2013. His current term will end in 2024. Chair Castellanos is dedicated to the work performed by the Port District and is evaluating whether he would be eligible to work for the Port District after he is no longer on the Board.

The current Port District CEO is on paid administrative leave. The Port District has and will need to consider actions regarding such leave. Chair Castellanos approved a closed session meeting agenda for a July 11, 2023, meeting regarding the CEO. Following that closed session, the CEO went on administrative leave. The Chair was not present and did not participate in any Board discussions or decisions concerning the CEO's leave during that meeting. In a subsequent email and phone conversation, you clarified that closed-session items relate to legal matters. It was the General Counsel who placed the CEO item on the agenda, and Chair Castellanos received the proposed agenda for evaluation. You are not at liberty, due to potential litigation issues related to

the CEO position, to elaborate on the circumstances further. In regard to Chair Castellanos' decision not to participate in the closed session, you noted that he did not want to be involved in a decision that could lead to a vacancy due to his interest in the position.

At its closed session meeting on July 14, 2023, the Board named an acting CEO. Chair Castellanos did not place this item on the closed meeting agenda, was not present at this meeting, and did not participate in the discussion or decision of naming an acting CEO.

Although the current CEO is on administrative leave, there is no vacancy in the position. There is no search committee, or any other efforts taken to find a new, permanent CEO. Chair Castellanos has not participated in any formal discussions regarding the potential future selection of a new CEO. If the CEO eventually permanently leaves his position, the Board will necessarily need to commence discussions to hire a new, permanent CEO. If the current CEO permanently leaves his position, Chair Castellanos may consider resigning from the Board and may seek the position of permanent CEO, if he is eligible.

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 v. Taft, 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 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).)

Here, the Board, including Chair Castellanos, has the authority to hire an individual for the CEO position, which is in the nature of an employment contract. Preliminarily, we note that as a current member of the Board, Chair Castellanos is “conclusively presumed to be involved in the making of all contracts” by the Board even if he did not actually participate in the hiring decision. Therefore, Section 1090 prohibits him from entering a contract with the Port District for the CEO

position, or any other position, while serving as a member of its Board. (*Finnegan v. Schrader* (2001) 91 Cal.App.4th 572, [a special district board member who applied for and was offered the position of district manager while still serving on the board, conditional on his resignation, violated Section 1090].)

The issue raised is whether he would be able to first resign from the Board and then enter into a subsequent employment contract for the CEO position or any other 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. Taft, supra*, at p. 569.) Where an official has “participated in the making of a contract,” the official may not leave office and later have a financial interest in the contract. (See, e.g., 81 Ops.Cal.Atty.Gen. 317 (1998) [council member could not participate in establishing a loan program and then leave office and apply for a loan]; and 66 Ops.Cal.Atty.Gen. 156 (1983) [county employees could not propose an agreement for consultant services, then resign, and provide such consulting services].)

Past advice letters provide instruction on preliminary actions in this particular employment context. 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 in the future upon the retirement of the current chief, where the city council had not taken any action concerning the selection of a new chief because, “[t]he Council itself has 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 (to be filled upon the expiration of the city manager’s contract and subsequent retirement) where the city council had already taken actions to fill the position. Specifically, it 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 and later resigned from the subcommittee before it had taken any official action. In *Cole* Advice Letter, A-22-021, we advised that a board member could not resign and enter into contract for the executive director position where the board discussed filling the position in closed session following the executive director’s resignation, assigned three board members to consider and recommend candidates for the position, and during a meeting to hire an interim director and at a subsequent meeting the board member stated his interest in the position. Therefore, in the employment context, “planning, preliminary discussions, negotiations, compromises, reasoning, drawing of plans and specification and solicitation for bids,” includes

actions such as discussions or planning to fill the position, including beginning the recruitment process.

If the Board's actions during his board membership involve planning or discussions about filling an employment position, including beginning a recruitment process, Chair Castellanos may not resign from the Board and enter into contract for the position. Under the facts provided, we advise that the Board's actions, placing the CEO on leave, engaging in litigation regarding this employee, and hiring an acting CEO, do not meet the criteria for "participation in the making" of the future CEO employment contract. No recruitment process has begun. However, we caution that this advice is based on the limited facts provided as to the closed session meetings that Chair Castellanos did not attend. If, in the course of these actions, the Board members did engage in preliminary discussions regarding filling the CEO position, or if the Board does so while Chair Castellanos is a board member, Section 1090 will prohibit the contract. We note that his recusal from Board meetings or actions will not affect the presumption of his participation.

Additionally, as noted above, Section 1090 prohibits a contract "if it is established that [the official] had the opportunity to, and did, influence execution directly or indirectly to promote [the official's] personal interests. (*People v. Sobel*, supra at p. 1052.) Therefore, the employment contract would be prohibited under Section 1090 if Chair Castellanos engaged in any activities to influence the making of the CEO contract to promote his interest in the CEO position. The facts do not indicate that Chair Castellanos has acted in such a manner. He has not attended the closed sessions regarding the current CEO or the hiring of the acting CEO, nor has he explicitly announced to the Board his intention to seek the position.

If you have other questions on this matter, please contact me 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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