



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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October 03, 2023

Brian Doyle
Interim City Attorney
City Attorney's Office
678 W. 18th Street
Merced, CA 95340

Re: Your Request for Advice
Our File No. A-23-144

Dear Mr. Doyle:

This letter responds to your request for advice on behalf of City of Merced Council Members Sarah Boyle and Shane Smith regarding the conflict of interest provisions of the Political Reform Act ("Act") and Government Code Section 1090, et seq.¹ Please note that we are only providing advice under Section 1090, and we do not provide advice 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 Merced 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

May City of Merced ("City") Council Members Boyle and Smith participate in decisions regarding the University of California at Merced ("UC Merced") annexation by the City where UC Merced employs Council Member Boyle and Council Member Smith's spouse?

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. The Act excludes salary and benefits received from UC Merced, a state agency, from the definition of “income,” and the facts establish that the decisions will not affect either employee’s salary or benefits as a personal financial effect. Therefore, neither official has a disqualifying financial interest in the decisions under the Act based on their employment or spouse’s employment with UC Merced.

Regarding Section 1090 and the two contract decisions involved in the annexation process, the facts indicate that the noninterest exception for government salaries in Section 1091.5(a)(9) is applicable. The contracts are general to UC Merced. The fees to be paid to the City do not directly involve the UC Merced departments that employ Council Member Boyle or Council Member Smith’s spouse, and do not involve direct financial gain to either. Under Section 1091.5 (a)(9), the officials and the City Council may enter into these contracts so long as the officials state their interest on the record at the time the contracts are considered, and their interests are noted in the official record.

FACTS AS PRESENTED BY REQUESTER

The City is in the process of annexing the UC Merced campus into its incorporated boundaries. The annexation process will include several agreements that will come before the City Council. The City anticipates the following decisions related to the annexation:

- Amendment of a transportation agreement to set fees for UC Merced’s participation in City infrastructure improvements.
- A Memorandum of Understanding (“MOU”) that will affect fees due from UC Merced to the City.
- LAFCO decisions
- CEQA decisions

UC Merced employs Council Member Sarah Boyle as a Social Media Coordinator. Ms. Boyle’s supervisors at UC Merced have advised that her duties will not involve the annexation process. UC Merced employs Council Member Shane Smith’s spouse, Katrina Hoyer, as a tenured professor. Neither of the employees is or will be involved with any annexation processes by UC Merced, nor will their salaries or compensation be affected by any of the decisions coming before the City Council.

ANALYSIS

The Act

The Act’s conflict of interest provisions prohibit a public official from taking part in a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the official’s financial interests, distinguishable from the decision’s effect on the public generally. (Sections 87100 and 87103.) The financial interests that may give rise to an official’s disqualifying conflict of interest under the Act are set forth in Section 87103 and include an interest in the official’s personal finances or those of immediate family, also referred to as a

“personal financial effect,” or an interest in a source of income, aggregating five hundred dollars (\$500) or more in value provided or promised to, or received by, the public official within 12 months prior to the time when the decision is made. (Section 87103 generally, and subd.(c).)

The Act’s definition of “income” includes any community property interest in a spouse’s income. (Section 82030(a).) However, the Act’s definition of “income” does not include “[s]alary and reimbursement for expenses or per diem, and social security, disability, or other similar benefit payments received from a state, local, or federal government agency” (Section 82030(b)(2).) UC Merced is a part of the University of California, a state agency for purposes of the Act.

As a UC Merced employee and the spouse of a UC Merced employee, respectively, Council Members Boyle and Smith receive income from a state government agency, and the facts indicate that none of the decisions will have an effect on the employee’s salaries or benefits. Therefore, although the decisions involve UC Merced, neither official has a potentially disqualifying source of income interest or personal financial interest in the decisions on the basis of the employment salary or benefits.² Based on the facts provided, the Act does not prohibit Council Member Boyle or Council Member Smith from taking part in decisions involving the City and UC Merced regarding the annexation.

Section 1090

Section 1090 pertains to decisions that involve a contract, is a separate body of law, and requires an independent analysis. Under Section 1090, public officials “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 a member.” 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.) 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.) Because the two officials at issue are members of the City Council, it is important to note that 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.)

At issue is whether either official has a financial interest in the contract decisions related to the annexation of the UC Merced campus to the City due to their interests in UC Merced as an employer. Although no specific details are provided, the facts state that two separate contracts are anticipated between the City and UC Merced. The first is an amendment to the Transportation Agreement to set fees for UC Merced’s participation in City infrastructure improvements. The

² Regulation 18702.5(a) states:

A governmental decision’s reasonably foreseeable financial effect on a public official’s financial interest in personal finances or those of immediate family, also referred to as a “personal financial effect,” is material if the decision may result in the official or the official’s immediate family member receiving a financial benefit or loss of \$500 or more in any 12-month period due to the decision.

second is an MOU that will affect the fees UC Merced pays to the City. Therefore, each contract decision could indirectly or directly impact UC Merced's finances, and each official has a financial interest in UC Merced as a source of employment income.³

However, the Legislature has addressed the issue of a public officer's involvement in a contract between two government agencies, where the public officer is employed by one agency and serves as a member of a body or board contemplating a contractual relationship and defined circumstances where the interest may be deemed a "noninterest" or a "remote" interest. We note that where a remote or noninterest would apply to an officer if the officer directly held the interest, it would apply when the officer's financial interest results from a community property interest in a spouse's income. (See 81 Ops.Cal.Atty.Gen. 169 (1998); 78 Ops.Cal.Atty.Gen. 230 (1995).)

Relevant to these facts, Section 1091.5(a)(9) provides that an officer or employee has a noninterest in a public contract if their interest in that contract is:

That of a person receiving salary, per diem, or reimbursement for expenses from a government entity, unless the contract directly involves the department of the government entity that employs the officer or employee, provided that the interest is disclosed to the body or board at the time of consideration of the contract, and provided further that the interest is noted in its official record.

In *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1081, the California Supreme Court determined that this exception applies when "the contract involves no direct financial gain, does not directly affect the official's employing department, and is only with the general government entity for which the official works."

The facts state that the two contracts are general to the fees UC Merced will pay to the City as part of the annexation. The contracts do not involve direct financial gain to Council Member Boyle or Council Member Smith's spouse and do not directly involve their employing departments. Council member Boyle's Social Media Coordinator duties do not include the annexation process. Council Member Smith's spouse is a tenured professor. Neither of the UC Merced employees has been or will be involved with UC Merced's annexation processes, nor will their salaries or compensation be affected by the two contract decisions. Accordingly, so long as Council Member Boyle and Council Member Smith disclose their financial interest in UC Merced to the City Council at the time the contract is considered and the interest is noted in the City Council's official record, Section 1090 does not prohibit either official, or the City Council as a whole, from contracting with UC Merced regarding the Transportation Agreement or the MOU.

³ For purposes of Section 1090, an official has an interest in the community and separate property income of the official's spouse. (*Nielsen v. Richards* (1925) 75 Cal.App. 680; *Thorpe v. Long Beach Community College Dist.* (2000) 83 Cal.App.4th 655; 89 Ops.Cal.Atty.Gen. 69 (2006).)

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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