



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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May 14, 2021

Richard D. Pio Roda
District Counsel
Rodeo Hercules Fire Protection District
1999 Harrison Street, 9th Floor
Oakland, California 94612

Re: Your Request for Advice
Our File No. A-21-054

Dear Mr. Pio Roda:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the “Act”) and Government Code Section 1090, et seq.¹ Please note that we are only providing advice under the Act and Section 1090, not under other general conflict of interest prohibitions such as common law conflict of interest, including 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 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

Under the Act and Section 1090, may Rodeo Hercules Fire Protection District Director Hill take part in decisions regarding the District’s potential consolidation with the Contra Costa County Fire Protection District (“Con Fire”), given that he is employed by Con Fire as its Public Information Officer?

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.

CONCLUSION

For purposes of the Act, Director Hill's compensation from Con Fire does not constitute potentially disqualifying "income," nor would his personal finances be materially affected. However, because Director Hill is an employee of Con Fire, he has a remote interest in the consolidation contract under Section 1091. Accordingly, while the District may contract with Con Fire regarding consolidation, Director Hill must properly recuse himself from the contracting process and decision.²

FACTS AS PRESENTED BY REQUESTER

The Rodeo Hercules Fire Protection District ("District") is an independent fire protection district organized and operated pursuant to the Fire Protection District Law of 1987, Health and Safety Code section 13800 *et seq.* The District provides fire protection services to an approximately 32 square-mile service area that includes the City of Hercules and the unincorporated town of Rodeo in Western Contra Costa County. The District is governed by an elected five-person board.

Con Fire is a dependent fire district governed by the Contra Costa County Board of Supervisors, acting in its capacity as the board of directors for Con Fire. The service area for Con Fire is approximately 304 square-miles, which is primarily located in central Contra Costa County, but also includes portions of western and eastern Contra Costa County. Portions of the Con Fire service area are contiguous with the District's boundaries and the two agencies work closely together through mutual aid and other similar arrangements.

Steve Hill is a member of the District's Board of Directors. Director Hill was elected to the Board in November 2018. Separate from his service on the Board, Director Hill is employed by Con Fire. He currently serves as the Public Information Officer ("PIO") for Con Fire, a position he has held since March 2018. Director Hill's employment with Con Fire is subject to Board of Supervisors' Resolution No. 2018/7 for county elected and appointed department heads, management, exempt, and unrepresented employees.

The District is currently exploring the possibility of consolidating with Con Fire. If consolidation is pursued and approved by the Contra Costa County Local Agency Formation Commission, the District's territory would become part of Con Fire's service area and the District would cease to exist. Although the details of a potential consolidation of the District with Con Fire are still unknown, any consolidation would also result in some level of increased tax revenues, more employees, and a larger budget for Con Fire. Consolidation of the District and Con Fire would invariably change some aspects of Director Hill's job as Con Fire's PIO. For example, a larger service area likely means an increase in the number of emergency events that require a response from Con Fire's PIO. However, consolidation would not change the fundamental nature of Director Hill's employment position. Furthermore, consolidation will not directly result in a promotion or

² We note that you have asked only whether Director Hill can take part in decisions by the District. To the extent Director Hill may wish or be asked by Con Fire to take part in the contracting process with the District in his capacity as Con Fire's Public Information Officer, we recommend he seek additional formal advice.

change of position for Director Hill, nor will it impact the salary and benefits received by Director Hill as part of his employment with Con Fire.

In a follow-up email, you clarified that Director Hill does not receive any salary, per diem, or reimbursement for expenses in his capacity as a District Director. Further, there is no line item in the District's budget for any payments of any kind to the Directors.

ANALYSIS

The Act

Under Section 87100 of the Act, “[n]o public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.” “A public official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family,” or on certain specified economic interests. (Section 87103.)

A public official has an economic interest in “[a]ny source of income . . . aggregating five hundred dollars (\$500) or more in value provided or promised to, received by, the public official within 12 months prior to the time when the decision is made.” (Section 87103(c).) Under the Act, “income” expressly 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).) Accordingly, Director Hill does not have an interest in Con Fire as a source of income for purposes of the Act, nor does he have an interest in the District. However, separate from sources of income, Director Hill has an economic interest in his own personal finances.

Regulation 18701(a) provides the applicable standard for determining the foreseeability of a financial effect on an economic interest explicitly involved in the governmental decision. It states, “[a] financial effect on a financial interest is presumed to be reasonably foreseeable if the financial interest is a named party in, or the subject of, a governmental decision before the official or the official’s agency. A financial interest is the subject of a proceeding if the decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the financial interest, and includes any governmental decision affecting a real property financial interest as described in Regulation 18702.2(a)(1)-(6).”

Where, as here, an official’s economic interest is not explicitly involved in the governmental decision, the applicable standard for determining the foreseeability of a financial effect on the economic interest is found in Regulation 18701(b). That regulation provides, “[a] financial effect need not be likely to be considered reasonably foreseeable. In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official’s control, it is not reasonably foreseeable.”

A governmental decision's reasonably foreseeable financial effect on a public official's financial interest in their 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. (Regulation 18702.5(a).) A personal financial effect is not material if the decision would affect only the salary, per diem, or reimbursement for expenses the public official or a member of their family receives from a federal, state, or local government agency unless the decision is to appoint, hire, fire, promote, demote, suspend without pay or otherwise take disciplinary action with financial sanction against the official or a member of their immediate family, or to set a salary for the official or a member of their immediate family which is different from salaries paid to other employees of the government agency in the same job classification or position, or when the member of the public official's immediate family member is the only person in the job classification or position. (Regulation 18702.5(b)(1).)

Here, although the District's potential consolidation with Con Fire would "invariably change some aspects of Director Hill's job as Con Fire's PIO," it would not directly result in a promotion or change of position for Director Hill. You have also stated that the consolidation would not impact the salary and benefits received by Director Hill as part of his employment with Con Fire. Additionally, although consolidation would result in the dissolution of the District, Director Hill receives no form of compensation from the District. Accordingly, to the extent consolidation would not result in an increase in salary, benefits, or promotion, consolidation would have no material effect on Director Hill's personal finances. Under the Act, Director Hill has no disqualifying conflict of interests under the Act regarding potential consolidation with Con Fire.

Section 1090

Under Section 1090, public officers "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. City of Taft* (1962) 58 Cal.2d 565, 569.) 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.) Additionally, a decision to modify, extend, or renegotiate a contract constitutes involvement in the making of a contract under section 1090. (See, e.g., *City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, 193; see also 98 Ops.Cal.Atty.Gen. 102 (2015) ["It is well settled that changes to existing contracts are themselves 'contracts' under section 1090"].)

The Legislature has created various statutory exceptions to Section 1090's prohibition where the financial interest involved is deemed to be a "remote interest," as defined in Section 1091, or a "noninterest," as defined in Section 1091.5. Of the statutory exceptions established for a remote interest and noninterest, two exceptions for contracts between government agencies are potentially applicable. First, under Section 1091(b)(13), an agency board member that receives salary, per diem, or reimbursement for expenses from another government entity has a remote interest in a contract between the two agencies. Under Section 1091.5(a)(9), an officer or employee of a

government agency receiving salary, per diem, or reimbursement for expenses from another government entity has a noninterest in a contract between the two agencies “unless the contract directly involves the department of the governmental 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.” (Section 1091.5(a)(9).)

The contract at issue involves Con Fire, a County department that employs Director Hill and, therefore, the Section 1091.5(a)(9) noninterest exception is inapplicable. However, given that Director Hill receives salary from Con Fire, Section 1091(b)(13) is applicable and his interest in the contract between the District and Con Fire is remote. Under Section 1091, Director Hill may not participate in the decision due to his remote interest. The District may make contract-related decisions with Con Fire if Director Hill discloses his interest in the contract to the District, the interest is noted in the District’s official records, and he abstains from any participation in making or approving any contract-related decision. (Section 1091(a).)

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

Sincerely,

Dave Bainbridge
General Counsel


By: Kevin Cornwall
Counsel, Legal Division

KMC:dkv