



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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August 1, 2019

Allison E. Burns
660 Newport Center Drive Suite 1600
Newport Beach, CA 92660-6422

Re: Your Request for Advice
Our File No. A-19-106

Dear Ms. Burns:

This letter responds to your request for advice on behalf of the Spalding Community Service District Board ("District Board"), regarding the conflict of interest provisions of Government Code Section 1090. 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.

In regard to our advice on Section 1090, we are required to forward your request and all pertinent facts relating to the request to the Attorney General's Office and the Lassen 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

Does Section 1090 prohibit the District Board from hiring current Board Member Read as the General Manager of the District if he first resigns from his position on the Board?

CONCLUSION

Yes. Section 1090 prohibits the Board from hiring Board Member Read as the District's General Manager even if he first resigns from his position on the Board unless the rule of necessity applies.

FACTS AS PRESENTED BY REQUESTER

You are special counsel to the Spalding Community Service District ("District"), which serves a population of 178 residents in the community of Spalding, an unincorporated community in Lassen County. The District's service area covers 3.3 square miles and is located on the west side of Eagle Lake, 2.1 miles east-northeast of Whaleback Mountain, and 3 miles northeast of Eagle

Lodge. The District provides fire, emergency medical service, sewer, and recreational facilities to the community of Spalding.

Chris Gallagher served as the District's General Manager for six years until his resignation in November of 2016. Prior to his resignation, Mr. Gallagher notified the District of his impending resignation so in September of 2016 the District began advertising for a replacement General Manager. The District ran an advertising campaign, which involved newspaper advertisements and personal contact with referred candidates. Spalding did not have any luck finding a replacement but ultimately hired Lana Culjis in May of 2017 after a nine-month search.

Ms. Culjis was underqualified for the position of General Manager and, as such, her tenure did not last. In June of 2018, Ms. Culjis tendered her notice of resignation to the District. Again, the District began searching for a qualified General Manager. Its recruitment efforts have been unsuccessful due to the limited number of interested and qualified candidates presently residing in Spalding.

During the latest recruitment process, lasting from February 15, 2019, to April 1, 2019, Spalding advertised the General Manager position in the Lassen County Times newspaper and on the website for the California Special Districts Association. In response to the most recent recruitment process, Spalding received responses from four potential candidates. The first applicant, a management company, was qualified for the position but unaffordable. A second management company was similarly unaffordable and withdrew its application. The third applicant was underqualified for the position and, as such, Spalding did not pursue her candidacy. The final applicant was qualified and affordable, and signed an employment agreement with Spalding on March 22, 2019. However, she did not appear for work the first week and rescinded the contract due to personal circumstances.

Spalding is located in an area of very low population and lacks the resources to garner any interest from individuals outside of Spalding. As such, the District has been without a viable, qualified General Manager since November of 2016, and desperately needs to fill the position to ensure that it is able to function.

Darren Read, a member of the District Board since 2015, recently applied for the position. He remains the only qualified and affordable applicant willing to serve as General Manager for the District. He has served as a Board Member while the search for a new general manager has been ongoing. Board Member Read has reviewed at least one application and participated in one interview conducted by the Board after which the Board voted to hire the candidate who signed a contract but failed to ever show up for the job.¹

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

¹ You state that on March 27, 2019, after learning of Mr. Read's application for the position, your office advised Mr. Read and the District Board in writing that the requested resignation and subsequent appointment of Board Member Read as General Manager is likely in violation of Section 1090 and, if Mr. Read was interested in such resignation and subsequent appointment, he or the District should request formal written advice from the Commission.

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, 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.)

Notably, 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 his or her 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).)

Furthermore, 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. City of Taft, supra*, at p. 569.)

Pursuant to Section 1090, leaving public employment may not avoid a Section 1090 violation when the person has been involved in the contract process. In *City Council v. McKinley* (1978) 80 Cal. App.3d 204, 212, 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 affecting 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.

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.

Similarly, the Attorney General's Office has opined that county employees could not propose an agreement for consulting services, then resign, and provide the proposed services (66 Ops.Cal.Atty.Gen. 156 (1983)) and a council member could not participate in the establishment of a loan program and then leave office and apply for a loan (81 Ops.Cal.Atty.Gen. 317 (1998).)

Finally, in the *Burns* Advice Letter, FPPC No. A-15-096, the board of a joint powers authority appointed a search committee to find a replacement for the Executive Director who had recently announced her retirement. Soon thereafter, a member of the search committee advised a member of the board that he had been suggested for the position. The board member resigned six weeks later. We advised that the board member had participated in the making of the employment agreement, and that Section 1090 prohibited him from taking the Executive Director position. (See also *Montoy* Advice Letter, No. A-15-165 [city council member could not resign from office and then be hired as the city manager because he is deemed to have participated in making the employment contract under Section 1090].)

In all of these matters, Section 1090 prohibited an official from participating in the making of a contract and attempting to enter the contract after resigning from office. Here, Board Member Read has been a Member of the District Board during the time it has conducted a search for a General Manager. He has been personally involved in the search and he applied for the General Manager position while in this capacity. Now, Board Member Reed proposes to resign in hopes that the District Board will rehire him as the General Manager. Pursuant to these facts and based on the authority cited above, we find that Mr. Read participated in the making of the employment agreement concerning the General Manager position; Section 1090 therefore prohibits him from resigning in order to enter an agreement with the District for that position.²

Rule of Necessity

You have asked whether the "rule of necessity" may be applicable to the present situation. In limited cases, the "rule of necessity" has been applied to allow the making of a contract that Section 1090 would otherwise prohibit. (*Eldridge v. Sierra View Hospital Dist.* (1990) 224 Cal.

² You have asked if Board Member Read and the District could allow a certain amount of time to lapse subsequent to his resignation before entering the new employment agreement in order to avoid violating Section 1090. We are unaware of any exception under Section 1090 concerning a time lapse that would allow the District and Board Member Read to enter the agreement.

App. 3d 311, 322.) The rule has been applied where public policy concerns authorize the contract and “ensures that essential government functions are performed even where a conflict of interest exists.” (*Ibid.*; See also 69 Ops.Cal.Atty.Gen. 102, 109 (1986)). The rule of necessity permits a government body to act to carry out its essential functions if no other entity is competent to do so. (*Lexin, supra*, at p. 1097.)

The rule of necessity has been applied in at least two specific types of situations: 1) in procurement situations for essential supplies or services when no source other than the one that triggers the conflict is available; and 2) in nonprocurement situations to carry out essential duties of the office when the official or board is the only one authorized to act.

It is important to note that the rule of necessity has only been applied in very limited situations. For example, a city could obtain emergency nighttime services from a service station owned by a member of the city council, where the town was isolated, and the council member’s station was the only one in the area that was open. (4 Ops. Cal.Atty.Gen. 264 (1944).) Also, a healthcare district in a remote area could advertise its services on a local radio station, even though one of the district’s directors was employed at the station. After exploring other outlets, it was clear that the radio station was the only source that would deliver the necessary information in an efficient, cost-effective, and timely manner. (88 Ops.Cal.Atty.Gen. 106 (2005).)

What these situations have in common is the exigency of the circumstances such that delaying action to contract with a non-conflicted source would be to the detriment of the affected people. (See *Ramos* Advice Letter, No. A-14-105).

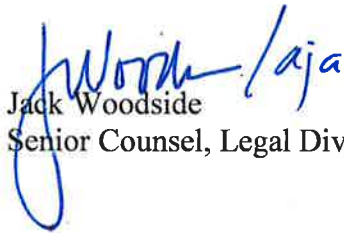
Here, you state Spalding is located in an area of very low population and lacks the resources to garner any interest from individuals outside of Spalding. As such, Spalding has been without a viable, qualified General Manager since November 2016, and desperately needs to fill the position to ensure that Spalding is able to function. Recently, the District had four applicants interested in the position but three of them were either unaffordable or underqualified. The fourth applicant was apparently affordable and qualified because the District hired her for the position. However, due to personal reasons, she rescinded the employment contract. You state that Board Member Read is currently the only qualified and affordable applicant willing to serve as General Manager for Spalding.

As stated above, the “rule of necessity” applies when there is no alternative source for essential services and when necessary to carry out essential duties. However, we are not in a position to assess the District’s efforts to hire a General Manager or the District’s ability to continue to operate without a General Manager. Accordingly, we cannot conclusively determine that the “rule of necessity” applies to allow the District to enter into an employment agreement with Board Member Read to be the General Manager despite the existence of a conflict of interest under Section 1090; and we must leave it to the District and Board Member Read, who have full knowledge of all the facts and circumstances, to make the factual determination as to whether the “rule of necessity” applies in this situation. In making this determination, we caution that the rule of necessity may apply only to the extent that the District has made a reasonable effort to advertise and recruit for the position, extended competitive and adequate offers to qualified applicants, and does not provide a better offer to Board Member Read than those extended to other qualified applicants.

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

Sincerely,

Dave Bainbridge
General Counsel

By:  /aja
Jack Woodside
Senior Counsel, Legal Division

JW:aja