TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

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OPINION	:	No. 05-1006
of	:	October 3, 2006
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THE HONORABLE AUDRA STRICKLAND, MEMBER OF THE STATE ASSEMBLY, has requested an opinion on the following question:

Where a member of the governing board of a community college district receives retirement health benefits from the district as a former faculty member in an amount that is required by contract to be equal to the amount of health benefits the district provides to current faculty members under the terms of a collective bargaining agreement, may the governing board renegotiate the amount of health benefits provided under the current collective bargaining agreement?

CONCLUSION

Where a member of the governing board of a community college district receives retirement health benefits from the district as a former faculty member in an amount that is required by contract to be equal to the amount of health benefits the district provides to current faculty members under the terms of a collective bargaining agreement, the governing board may renegotiate the amount of health benefits provided under the current collective bargaining agreement so long as the financially interested board member does not participate in the decision-making process.

ANALYSIS

The governing board of a community college district has broad authority to act in any manner "not in conflict with the purposes for which community college districts are established." (Ed. Code, § 70902, subd. (a); see *Service Employees Internat. Union v. Board of Trustees* (1996) 47 Cal.App.4th 1661, 1665-1666.) Among its various duties, a governing board is charged with establishing "employment practices, salaries, and benefits" for district employees. (Ed. Code, § 70902, subd. (b)(4); 84 Ops.Cal.Atty.Gen. 175, 175-176 (2001).)

We are informed that the renegotiation of a collective bargaining agreement between a district's governing board and its faculty members may involve changes in the level of health benefits for faculty members. We are further informed that one of the governing board members is a retired faculty member[1] and, as such, receives health benefits by virtue of his former employment. Pursuant to the terms of a prior collective bargaining agreement, the board member's health benefits are equal in amount to the health benefits provided to current faculty members.

Given this context, we are asked whether the governing board may renegotiate the amount of health benefits provided to its current faculty members and, if so, whether the financially interested board member may participate in board discussions, negotiations, and decisions affecting the amount of such negotiated benefits. In answering this question, we will primarily consider the conflict-of-interest prohibition contained in Government Code section 1090,[2] which generally precludes the board of a public agency from entering into a contract in which one of its members has a personal financial interest.

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[1] We note that *current* community college district employees are prohibited from serving as governing board members. (Ed. Code, § 72103, subd. (b)(1).)

[2] All further references to the Government Code are by section number only.

Section 1090 is expressly applicable to the members of a community college board of trustees (Ed. Code, § 72533; 84 Ops.Cal.Atty.Gen. 126, 126-127 (2001)) and provides in part:

> "Members of the Legislature, state, county, district, judicial district, and city officers or employees 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 members. . . ."

The statute 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 public 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 (*Thomson v. Call* (1985) 38 Cal.3d 633, 646), and a public official who willfully violates the statute is subject to criminal prosecution (§ 1097; see *People v. Gnass* (2002) 101 Cal.App.4th 1271, 1297).

We have previously concluded that the modification of a collective bargaining agreement by a school district's governing board constitutes the making of a contract within the meaning of section 1090. (See, e.g., 65 Ops.Cal.Atty.Gen. 305, 307 (1982); see also *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 304 [collective bargaining agreements are binding contracts]; *City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, 196-197 [renewal of concessionaire contract constitutes "making" of contract for purposes of section 1090]; 81 Ops.Cal.Atty.Gen. 134, 136-137 (1998) [renegotiation of rental agreement and water fee constitutes "making" of contract].)

Here, the terms of the collective bargaining agreement do not by themselves apply to the financially interested board member. (Cf. 73 Ops.Cal.Atty.Gen. 191, 193-194 (1990) ["obvious" conflict arises for school board member who is also a teacher within the district when board makes decisions regarding teacher salaries].) However, under a prior collective bargaining agreement, his health benefits are equal to the health benefits provided to current faculty members. Such a financial interest in the amount of the health benefits subject to renegotiation comes within the general language of section 1090. (See *Thomson v. Call*, *supra*, 38 Cal.3d at p. 645; *People v. Honig*, *supra*, 48 Cal.App.4th at p. 315; see also *People v. Deysher* (1934) 2 Cal.2d 141, 146.)

Does section 1090 prevent the governing board from renegotiating faculty health benefits, given the board member's financial interest in the amount of those benefits? Preliminarily, we reject the suggestion that section 1090 is inapplicable due to the fact that

the financially interested board member is also eligible to receive health benefits as a member of the governing board. Section 53201, subdivision (a), states in part:

> "The legislative body of a local agency, subject to conditions as may be established by it, may provide for any health and welfare benefits for the benefit of its officers, employees, retired employees, and retired members of the legislative body . . . ."

Section 53208 provides:

> "Notwithstanding any statutory limitation upon compensation or statutory restriction relating to interests in contracts entered into by any local agency, any member of a legislative body may participate in any plan of health and welfare benefits permitted by this article."

Read together, these provisions authorize a governing board to provide health benefits to its own members, despite section 1090's general prohibition against a board member having a personal financial interest in such an agreement. (See 77 Ops.Cal.Atty.Gen. 50, 52 (1994); 73 Ops.Cal.Atty.Gen. 296, 299 (1990).) However, here, the financial interest with which we are concerned is *not* the one that the financially interested board member has or might have in health benefits in his capacity as a governing board member – i.e., "health and welfare benefits permitted by this article" within the meaning of section 53208 – but rather the health benefits provided to him by virtue of his former employment with the district. Those retirement benefits do not come within the purview of section 53208.[3]

As a general rule, the prohibition of section 1090 cannot be avoided by having the financially interested member of the legislative body abstain from participating in executing the agreement; instead, the entire body is precluded from entering into the contract. (*Thomson v. Call*, *supra*, 38 Cal.3d at pp. 647-649; *Stigall v. City of Taft*, *supra*, 58 Cal.2d at p. 569; *City of Imperial Beach v. Bailey*, *supra*, 103 Cal.App.3d at p. 197; 86 Ops.Cal.Atty.Gen. 138, 139 (2003); 70 Ops.Cal.Atty.Gen. 45, 48 (1987).) However, the Legislature has created various statutory exceptions to section 1090's prohibition where the financial interest involved is deemed to be a "remote interest" (§ 1091) or a "noninterest" (§ 1091.5). (See *Citizen Advocates, Inc. v. Board of Supervisors* (1983) 146 Cal.App.3d 171, 178-179; *Fraser-Yamor Agency, Inc. v. Del Norte County* (1977) 68 Cal.App.3d 201, 217-218; 81 Ops.Cal.Atty.Gen. 373, 375-376 (1998).) If a "remote interest" is present, as defined in section 1091, the contract may be made if (1) the officer in question discloses his

[3] We are informed that here, the health benefits for governing board members are not equivalent to those provided to current and retired faculty members.

or her financial interest in the contract to the public agency, (2) such interest is noted in the entity's official records, and (3) the officer abstains from any participation in the making of the contract. (See 88 Ops.Cal.Atty.Gen. 106, 108 (2005); 83 Ops.Cal.Atty.Gen. 246, 248 (2000); 78 Ops.Cal.Atty.Gen. 230, 235-237 (1995); 65 Ops.Cal.Atty.Gen., *supra*, at p. 307.) If a "noninterest" is present, as defined in section 1091.5, the contract may be made without the officer's abstention, and generally a noninterest does not require disclosure. (*City of Vernon v. Central Basin Mun. Water Dist.* (1999) 69 Cal.App.4th 508, 514-515; 84 Ops.Cal.Atty.Gen. 158, 159-160 (2001).)

Only one "remote interest" exception merits our discussion in these circumstances. Under section 1091, subdivision (b)(13), an exception is provided for "a person receiving salary, per diem, or reimbursement for expenses from a government entity," and "salary" may be construed to include a retired employee's health benefits.[4] However, we have interpreted this exception as encompassing a public official's employment with *another* government agency seeking to contract with the legislative body of which the official is a member. (See 83 Ops.Cal.Atty.Gen., *supra*, at pp. 248-249; see also 85 Ops.Cal.Atty.Gen. 6, 7 (2002) [exception applies when contract is between two public agencies].) For example, we have concluded that this remote interest exception would allow a city council, one of whose members is a deputy sheriff, to contract with the sheriff's office to furnish patrol services to the city, provided that the council member-deputy sheriff refrained from any participation in the making of the contract. (83 Ops.Cal.Atty.Gen., *supra*, at p. 249.)

But the applicability of this exception has not been extended to a situation, like the present one, in which the public official has a personal financial interest (albeit indirect in this instance) in the terms of a contract between the governing body and its own employees. Indeed, when we considered the analogous situation of a school teacher elected to a local school board, we determined that while the teacher could serve on the governing board,[5] she would encounter conflicts of interest "from time to time when performing her dual responsibilities," such as the "obvious conflict" that would arise for her when the board makes decisions concerning teacher salaries. (73 Ops.Cal.Atty.Gen., *supra*, at p. 193.) In such situation, this exception is unavailable. (See *Eldridge v. Sierra View Local Hospital Dist.* (1990) 224 Cal.App.3d 311, 321.)

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[4] Retirement benefits "are not gratuities but represent deferred compensation for past service." (*In re Marriage of Stenquist* (1978) 21 Cal.3d 779, 793; *Waite v. Waite* (1972) 6 Cal.3d 461, 469.)

[5] The Legislature has since prohibited a teacher from simultaneously serving as a school board member. (Ed. Code, § 35107, subd. (b).)

Likewise, here, it is not a different public agency that seeks to contract with the governing board of a community college district. Rather, we have contractual negotiations that will have an impact on the amount of health benefits the public official will receive under the contract between the governing board and its own employees. Under these circumstances, the remote interest exception of section 1091, subdivision (b)(13), is inapplicable.[6]

Nonetheless, a limited "rule of necessity" has been applied in specific circumstances to allow the making of a contract that section 1090 would otherwise prohibit. (See 80 Ops.Cal.Atty.Gen. 335, 338-339 (1997); 73 Ops.Cal.Atty.Gen., *supra*, at p. 195; 69 Ops.Cal.Atty.Gen. 102, 107-112 (1986); 65 Ops.Cal.Atty.Gen., *supra*, at pp. 308-311.) Under the rule of necessity, a governing board may perform essential and necessary functions, including renegotiating a collective bargaining agreement with the board's employees, as long as the board member with the financial conflict does not participate in the decision-making process. (*Eldridge v. Sierra View Hospital Dist.*, *supra*, 224 Cal.App.3d at p. 322; 70 Ops.Cal.Atty.Gen., *supra*, at p. 48.)

As we observed in 73 Ops.Cal.Atty.Gen. 191, *supra*, "We have based our 'rule of necessity' opinions allowing school boards to enter into contracts with their employees on the grounds that a school board is the only entity empowered to contract on behalf of a school district" and that "a district must employ teachers." (*Id*. at p. 195; see 69 Ops.Cal.Atty.Gen., *supra*, at pp. 107-112; 65 Ops.Cal.Atty.Gen., *supra*, at pp. 308-311; see also 73 Ops.Cal.Atty.Gen., *supra*, at p. 304; 44 Ops.Cal.Atty.Gen. 114, 115-116 (1964).) It follows that the governing board of a community college district may renegotiate the amount of health benefits for its faculty members so long as the financially interested board member refrains from participating in any discussions, negotiations, or decisions regarding the agreement. (See *Eldridge v. Sierra View Hospital Dist.*, *supra*, 224 Cal.App.3d at p. 322; 73 Ops.Cal.Atty.Gen. at pp. 195-196.)

Finally, we briefly examine the conflict-of-interest provisions of the Political Reform Act of 1974 (§§ 81000-91014; "Act"), which generally prohibit public officials from participating in governmental decisions in which they have a "financial interest." (§ 87100; see 88 Ops.Cal.Atty.Gen. 32, 33-34 (2005); 78 Ops.Cal.Atty.Gen. 362, 368-374 (1995); 74 Ops.Cal.Atty.Gen. 82, 86 (1991); 70 Ops.Cal.Atty.Gen, *supra*, at p. 46.) While a "financial interest" within the meaning of the Act is defined to include "[a]ny source of income" (§ 87103, subd. (c)), "income" is defined to exclude "[s]alary . . . received from a state, local, or federal government agency" (§ 82030, subd. (b)(2); see also Cal. Code Regs., tit. 2, §

[6] The more restrictive noninterest exception for government salaries set forth in section 1091.5, subdivision (a)(9) (see 83 Ops.Cal.Atty.Gen., *supra*, at p. 248), would be inapplicable for similar reasons.

18705.5 [financial effect of a decision is not material if it affects only the salary, per diem, or reimbursement for expenses that a public official receives from a federal, state, or local governmental entity]). The Fair Political Practices Commission, which administers the Act, has determined that retirement benefits are a form of deferred compensation that fall within the "salary" exclusion of section 82030, subdivision (b)(2). (*In re Moore* (1977) 3 FPPC Ops. 13.) Accordingly, the Act's provisions do not affect our determination with respect to the necessary actions to be taken by the governing board member in question. (See 77 Ops.Cal.Atty.Gen., *supra*, at p. 51; 73 Ops.Cal.Atty.Gen., *supra*, at p. 194.)

We conclude that where a member of the governing board of a community college district receives health benefits from the district as a former faculty member in an amount that is required by contract to be equal to the amount of health benefits the district provides to current faculty members under the terms of a collective bargaining agreement, the governing board may renegotiate the amount of health benefits provided under the current collective bargaining agreement so long as the financially interested board member does not participate in the decision-making process.

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