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OPINION	:	No. 13-702
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of	:	October 15, 2014
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THE HONORABLE BRICE W. HARRIS, CHANCELLOR, CALIFORNIA COMMUNITY COLLEGES, has requested an opinion on the following questions:

1. A trustee of a community college district board is married to a tenured professor in the district. The professor attained that position more than a year before the trustee took office. May the trustee participate in the process of collective bargaining between the district and the bargaining unit that represents the professor-spouse?

2. A trustee of a community college district board is a retired president of a college in the district. As a retiree, he receives retirement health benefits from the district equal to benefits the district provides to current employees. May the trustee participate in the process of renegotiating health benefits provided to current employees?

## CONCLUSIONS

1. A trustee of a community college district board may participate in collective bargaining between the district and the bargaining unit that represents his professor-spouse, provided that the spouse attained that position more than a year before the board member took office, and that the collective bargaining agreement does not result in new or different employment for the spouse.

2. A trustee of a community college district board who receives retirement health benefits equal to benefits the district provides to current employees may not participate in the process of renegotiating health benefits provided to current employees.

## ANALYSIS

California has a system of community colleges, which is managed at the statewide level by the California Community Colleges Board of Governors.<sup>1</sup> At the local level, each community college district has its own board of trustees.<sup>2</sup> The board of trustees is responsible for establishing employment practices, salaries, and benefits for the district's employees.<sup>3</sup> To that end, the board may engage in collective bargaining and enter into agreements with district employees and their union representatives.<sup>4</sup>

A trustee of a community college district board was elected to a four-year term beginning July 1, 2013. His spouse has been a tenured professor in the district since at least July 1, 2012. The professor's compensation and benefits are established by a collective bargaining agreement between the district and the faculty bargaining unit, which represents about 4,000 faculty members. Before joining the district board, the trustee was the president of a community college in the district. As a retiree of the district, he receives the same health benefits that current employees of the district receive, and will continue to do so after his board service ends.<sup>5</sup>

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<sup>1</sup> Ed. Code, §§ 70900-70901.5, 71020-71051; 84 Ops.Cal.Atty.Gen. 175, 175 (2001).

<sup>2</sup> Ed. Code, §§ 70900, 70902, 72000-72682; 84 Ops.Cal.Atty.Gen., *supra*, at p. 175.

<sup>3</sup> Ed. Code, § 70902, subd. (b)(4); 89 Ops.Cal.Atty.Gen. 217, 217 (2006); 84 Ops.Cal.Atty.Gen., *supra*, at p. 175.

<sup>4</sup> See 89 Ops.Cal.Atty.Gen., *supra*, at pp. 217-218.

<sup>5</sup> In fact, all members of the board of trustees receive the same health benefits as current employees while they serve on the board. However, in contrast to district employee-retirees, district trustees in general are not entitled to continue receiving health benefits after their board service ends.

## Question 1

We have been asked to consider whether a community college district board trustee is barred under Government Code section 1090 from participating in collective bargaining that pertains to his spouse's employment as a tenured professor.<sup>6</sup>

Section 1090 provides in pertinent 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 purpose of section 1090 is to prohibit public officers from participating in public contract decisions in which they have a personal financial interest.<sup>7</sup> The rule prevents a financially-conflicted public official not only from approving a contract but from partaking in preliminary discussions, planning, influencing, compromising, or otherwise participating in the process leading up to the formal making of the contract.<sup>8</sup> Section 1090 “codifies the long-standing common law rule that barred public officials from being personally financially interested in the contracts they formed in their official capacities,”<sup>9</sup> and reflects “[t]he truism that a person cannot serve two masters simultaneously.”<sup>10</sup>

Where section 1090 applies, it typically prevents not only the conflicted member but also the entire board or body upon which the financially-interested official sits from

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<sup>6</sup> We note that the conflict-of-interest provisions of the Political Reform Act of 1974 (Gov. Code, §§ 81000-91014), which generally prevent public officers from participating in governmental decisions in which they have a foreseeable financial interest, are not implicated here because an interest in a person's government salary and benefits are excluded from that Act's definition of “financial interest.” (See Gov. Code, §§ 82030, subd. (b)(2), 87100, 87103, subd. (c); 89 Ops.Cal.Atty.Gen., *supra*, at p. 222.)

<sup>7</sup> See *Thorpe v. Long Beach Community College Dist.* (2000) 83 Cal.App.4th 655, 659 (*Thorpe*); *People v. Honig* (1996) 48 Cal.App.4th 289, 333 (*Honig*).

<sup>8</sup> See *Honig, supra*, 48 Cal.App.4th at p. 315.

<sup>9</sup> *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1072 (*Lexin*).

<sup>10</sup> *Id.* at p. 1073, internal quotations omitted.

making the contract.<sup>11</sup> In limited circumstances, however, a “rule of necessity”<sup>12</sup> may be invoked to allow a board to perform essential business despite a member’s conflict. In particular, the rule of necessity has been applied to allow school boards to contract with its employees in situations similar to this one, because “a school board is the only entity empowered to contract on behalf of a school district” and “a district must employ teachers.”<sup>13</sup> Here too, we conclude that the rule of necessity would allow the community college district’s board to engage in the necessary collective bargaining with the faculty bargaining unit, regardless of any conflict the individual trustee might have.

That leaves us with the question whether the individual trustee at issue here may participate in the board’s actions. First, the Education Code makes it clear that trustees of a community college district board are subject to the restrictions of section 1090.<sup>14</sup> Further, it is well settled that a member of an education board is “financially interested” in a contract, within the meaning of section 1090, when the contract controls the salary or terms of his or her spouse’s employment.<sup>15</sup> Last, a collective bargaining agreement is a “contract” under section 1090.<sup>16</sup> Thus, section 1090’s prohibition does generally apply under these circumstances.

There are, however, a number of statutory exceptions to the prohibition, one of which is salient here. Government Code section 1091.5, subdivision (a)(6), provides that an officer will not be considered to be financially interested in a contract if his or her spouse is an employee of a public agency and if this employment has existed for at least

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<sup>11</sup> *Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201, 211-212; 95 Ops.Cal.Atty.Gen. 130, 139 (2012).

<sup>12</sup> Under the “rule of necessity,” a government board may perform essential functions, including entering into certain contracts that section 1090 would otherwise prohibit, under circumstances where no other entity is authorized to perform that function. (*Lexin, supra*, 47 Cal.4th at p. 1097; 89 Ops.Cal.Atty.Gen., *supra*, at p. 221.)

<sup>13</sup> 73 Ops.Cal.Atty.Gen. 191, 195 (1990); see also Ed. Code, § 70902, subd. (b)(4) (community college district board is sole entity authorized to carry out statutory function of establishing “employment practices, salaries, and benefits” for district’s employees).

<sup>14</sup> Ed. Code, § 72533; Cal. Code. Regs., tit. 2, § 18701, subd. (a)(2); 89 Ops.Cal.Atty.Gen., *supra*, at p. 218.

<sup>15</sup> *Thorpe, supra*, 83 Cal.App.4th at p. 659; 94 Ops.Cal.Atty.Gen. 22, 25 (2011); 92 Ops.Cal.Atty.Gen. 26, 27 (2009); 84 Ops.Cal.Atty.Gen., *supra*, at p. 177; 65 Ops.Cal.Atty.Gen. 305, 308 (1982); see Gov. Code, § 87103.

<sup>16</sup> 89 Ops.Cal.Atty.Gen., *supra*, at pp. 218-219; 69 Ops.Cal.Atty.Gen. 102, 110 (1986); 65 Ops.Cal.Atty.Gen., *supra*, at p. 307.

one year before the officer's election or appointment.<sup>17</sup> Here, both requirements are satisfied: the trustee's spouse (a tenured professor) is employed by a public agency (the community college district), and her tenured professorship existed at least one year before the trustee's election to the board.<sup>18</sup>

In 69 Ops.Cal.Atty.Gen. 102 (1986), we were asked whether a school district board member was prohibited from entering into a collective bargaining agreement with a teacher's association that represented his wife, who was a tenured teacher.<sup>19</sup> There, unlike here, the board member's spouse had been employed for less than a year before the board member took office.<sup>20</sup> As a result, the board member did not fall within the spousal noninterest exception, and thus was precluded from participating in the collective bargaining process (although the board could still act under the rule of necessity).<sup>21</sup> Here, the trustee's spouse actually held her tenured position for at least a year before the trustee took office, so the spousal noninterest exception applies, and the trustee may participate in collective bargaining with his spouse's bargaining unit.

There are, however, some significant limitations on the trustee's participation in making contracts (including collective bargaining) that affect his spouse's employment: A board member may participate in the making of a contract involving his or her spouse's employment only to the extent that the contract concerns the conditions applicable to the spouse's current class of employment, rather than creating some new or different employment for the board member's spouse.<sup>22</sup> This means, for example, that a board member may participate in the making of a contract that affects the salary and benefits of a class of employees that includes the spouse,<sup>23</sup> but that the board member

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<sup>17</sup> Government Code section 1091.5, subdivision (a)(6), states that "[a]n officer or employee shall not be deemed to be interested in a contract if his or her interest is . . . [t]hat of a spouse of an officer or employee of a public agency in his or her spouse's employment or officeholding if his or her spouse's employment or officeholding has existed for at least one year prior to his or her election or appointment."

<sup>18</sup> See 65 Ops.Cal.Atty.Gen., *supra*, at p. 311.

<sup>19</sup> 69 Ops.Cal.Atty.Gen., *supra*, at pp. 102-103.

<sup>20</sup> *Id.* at p. 103.

<sup>21</sup> *Id.* at pp. 108-109, 112. If the board member continued to serve, however, the spousal noninterest exception would eventually permit the member to participate in the collective bargaining process. (*Id.* at p. 112.)

<sup>22</sup> *Thorpe, supra*, 83 Cal.App.4th at pp. 660, 663-664; 87 Ops.Cal.Atty.Gen. 23, 27 (2004); 80 Ops.Cal.Atty.Gen. 320, 321 (1997).

<sup>23</sup> 69 Ops.Cal.Atty.Gen., *supra*, at pp. 107-108.

may not participate in the making of any contracts involving unique benefits to the spouse, such as decisions to promote, reclassify, or hire the spouse.<sup>24</sup> In such cases, the trustee would be required to abstain from any involvement in the contract-making process.<sup>25</sup>

Accordingly, we conclude that a trustee of a community college district board may participate in collective bargaining between the district and the bargaining unit that represents his professor-spouse, provided that the spouse attained that position more than a year before the board member took office, and that the collective bargaining agreement does not result in new or different employment for the spouse.

## Question 2

As a retired community college president, the trustee's health benefits are the same as those provided to the district's current employees. This circumstance gives rise to the question whether the trustee may participate in the process of renegotiating current employee health benefits. We conclude that the trustee's personal financial interest in the level of current employee benefits requires him to abstain from bargaining on this subject.

Our opinion in 89 Ops.Cal.Atty.Gen. 217 (2006) involved a community college district board member who, as a retired faculty member, was receiving the same health benefits as current district employees.<sup>26</sup> In that opinion, we concluded that section 1090 precluded the board member from renegotiating current faculty health benefits.<sup>27</sup> We noted that "the terms of the collective bargaining agreement do not by themselves apply to the financially interested board member."<sup>28</sup> Nonetheless, "under a prior collective bargaining agreement, his health benefits are equal to the health benefits provided to current faculty members," and "[s]uch a financial interest in the amount of the health benefits subject to renegotiation comes within the general language of section 1090."<sup>29</sup>

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<sup>24</sup> *Thorpe, supra*, 83 Cal.App.4th at p. 665; 69 Ops.Cal.Atty.Gen. 255, 259-260 (1986).

<sup>25</sup> 69 Ops.Cal.Atty.Gen., *supra*, at pp. 103, 112-113.

<sup>26</sup> 89 Ops.Cal.Atty.Gen., *supra*, at pp. 217-218.

<sup>27</sup> *Id.* at pp. 222-223.

<sup>28</sup> *Id.* at p. 219.

<sup>29</sup> Here, as in our 2006 opinion, the disqualifying financial interest does *not* arise from health benefits provided to a board member in his capacity as a member of the district's governing board, but rather from health benefits provided to a retiree in his capacity as a

We found no exception to section 1090 that would permit a board member in that situation to renegotiate the health benefits of the district’s employees.<sup>30</sup>

The 2006 opinion discussed why the “government salary” exceptions—both the remote interest exception set forth in Government Code section 1091, subdivision (b)(13),<sup>31</sup> and the noninterest exception set forth in Government Code section 1091.5, subdivision (a)(9)<sup>32</sup>—do not apply in circumstances such as these. Both of those provisions allow exceptions from the general section 1090 rule for “a person receiving salary, per diem, or reimbursement for expenses from a government entity.” We have consistently interpreted these exceptions 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,” thereby permitting, for example, a city to contract with a county sheriff’s department for patrol services, despite the fact that a deputy sheriff from that department is a member of that city’s council.<sup>33</sup>

Neither case law nor our own opinions have extended these exceptions to include circumstances where the public official “has a personal financial interest . . . in the terms

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former employee of the district. Retirement benefits do not come within the purview of Government Code section 53208, which exempts current board members’ benefits from the section 1090 rule.

<sup>30</sup> 89 Ops.Cal.Atty.Gen., *supra*, at pp. 220-221.

<sup>31</sup> Government Code section 1091, subdivision (b)(13), allows as a “remote interest” (with the conflicted member’s full disclosure and personal nonparticipation in the contract) the interest “of a person receiving salary, per diem, or reimbursement for expenses from a government entity.”

<sup>32</sup> Government Code section 1091.5, subdivision (a)(9), allows as a “noninterest” the interest “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.”

<sup>33</sup> 89 Ops.Cal.Atty.Gen., *supra*, at pp. 220-221, emphasis in original, citing 83 Ops.Cal.Atty.Gen. 246, 248-249 (2000); see also 85 Ops.Cal.Atty.Gen. 6, 7 (2002) (exception applies when contract is between two public agencies). As later observed in *Lexin*, a government salary exception may also apply where a public official seeks to contract *on behalf of* his or her public agency employer and his or her interest in the contract is only that of a salaried employee of the contracting party. (*Lexin, supra*, 47 Cal.4th at pp. 1083-1084.)

of a contract between the governing body and its own employees.”<sup>34</sup> To do so would, in effect, condone an “obvious conflict” such as would arise if a school teacher were to sit on a school board and participate in decisions concerning teacher salaries.<sup>35</sup> Thus, our 2006 opinion concluded that the renegotiation of current employee benefits would “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.”<sup>36</sup> Consequently, we deemed the government salary exceptions to be unavailable.<sup>37</sup>

Notably, in its decision in *Lexin v. Superior Court*,<sup>38</sup> the California Supreme Court expressly endorsed our conclusion on that point:

[T]he Attorney General considered [in 89 Ops.Cal.Atty.Gen. 217 (2006)] whether a community college district board member could participate in collective bargaining negotiations when his own personal health benefits, as a retired faculty member, were directly tied to those of the faculty with whom the district board would be negotiating. The Attorney General correctly concluded that, notwithstanding section 1091, subdivision (b)(13) and section 1091.5(a)(9), the board member could not. [Citation.] While the retirement health benefits qualified as government salary for purposes of the two provisions, the contract nevertheless created a personal financial interest—the board member’s health benefits would rise or fall according to the results of the negotiations. The board member thus faced a “two masters” problem: as a board member he was obligated to conserve the district’s resources, while personally he stood to benefit if the board was lavish in increasing faculty benefits.

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....[The government salary exception] is a defense if one’s financial interest in a proposed contract is only the present interest in an existing employment relationship with a first or second party to the proposed contract, and thus an interest in whatever indirect or incidental

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<sup>34</sup> 89 Ops.Cal.Atty.Gen., *supra*, at p. 221.

<sup>35</sup> A teacher may not serve as a member of the school board for his or her employing school district. (Ed. Code, § 35107, subd. (b).)

<sup>36</sup> 89 Ops.Cal.Atty.Gen., *supra*, at p. 221.

<sup>37</sup> *Id.* at pp. 220-221 & fn. 6.

<sup>38</sup> 47 Cal.4th 1050.



benefits might arise from the simple fact of contracting with or on behalf of one's employer. It does not extend further to contracts that . . . most directly affect one's interests by actually altering the terms of one's employment; such interests directly implicate the "two masters" problems section 1090 was designed to eliminate.<sup>39</sup>

In this case, because the trustee, as a retired president of the district, receives the same health benefits as current employees, his official interest in conserving district resources conflicts with his personal interest in drawing greater health benefits.<sup>40</sup> The

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<sup>39</sup> *Lexin, supra*, 47 Cal.4th at p. 1082, citing 89 Ops.Cal.Atty.Gen., *supra*, at p. 221 & fn. 6; see also *id.* at p. 1080.

<sup>40</sup> One other development in *Lexin* worth noting here is its treatment of the public services noninterest exception in Government Code section 1091.5, subdivision (a)(3), which provides that "[a]n officer or employee shall not be deemed to be interested in a contract if his or her interest is . . . [t]hat of a recipient of public services generally provided by the public body or board of which he or she is a member, on the same terms and conditions as if he or she were not a member of the board." *Lexin* held that, "where retirement board trustees approve contracts in which their only financial interest is an interest in benefits shared generally with their constituency at large, section 1091.5, subdivision (a)(3) excludes such actions from the purview of section 1090." (*Lexin, supra*, 47 Cal.4th at p. 1102.)

For our purposes, the key term is "constituency," which *Lexin* defined as "the people on whose behalf and for whose benefit [the public entity] acts, rather than being targeted or tailored to a select few." (*Id.* at pp. 1093-1094.) While a city retirement board's constituents are the employees and retirees that it serves (*id.* at p. 1096), the statutes authorizing community college district boards reveal that these boards' constituency is not composed of the district's current or retired employees, but is, rather, the district itself (see Ed. Code, §§ 66010.4, subd. (a)(1), 70902, subds. (a)(1), (b)). In sharp contrast with the Legislature's prescription for retirement boards, it has prohibited, rather than required, current employees from serving as community college district board members. (Ed. Code, § 72103, subd. (b)(1); 89 Ops.Cal.Atty.Gen., *supra*, at p. 218, fn. 1.) Since they are on different sides of a collective bargaining agreement, the board and the district's employees naturally have "conflicting economic interests" in a frequently "highly adversarial negotiating climate." (See *United Farm Workers v. Agricultural Labor Relations Bd.* (1993) 16 Cal.App.4th 1629, 1637.) Thus the board's interests are potentially "at odds" with the employees' interests. Because a community college district's employees are clearly not the district board's constituents, we believe that the health benefits that district employees and retirees receive are not public services within the meaning of Government Code section 1091.5, subdivision (a)(3), as interpreted by

government salary exceptions therefore do not allow him to “participate in board discussions, negotiations, and decisions affecting the amount of such negotiated benefits.”<sup>41</sup>

Therefore, we conclude that a trustee of a community college district board who receives retirement health benefits equal to benefits the district provides to current employees may not participate in the process of renegotiating health benefits provided to current employees.

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*Lexin.*

<sup>41</sup> 89 Ops.Cal.Atty.Gen., *supra*, at p. 218.