



OFFICE OF THE DISTRICT ATTORNEY

COUNTY OF SAN LUIS OBISPO, STATE OF CALIFORNIA

DAN DOW
District Attorney

PUBLIC INTEGRITY UNIT
MICHAEL S. FRYE
Deputy District Attorney

December 10, 2019

Board of Directors
Los Osos Community Services District
2122 9th Street, Suite 110
Los Osos, CA 93402

Re.: Compensation of Los Osos Community Services District Board Members

Dear Board Members:

I am writing in response to concerns raised about compensation received by some members of the Los Osos Community Services District (LOCSD) Board of Directors. Directors are entitled to receive compensation when they attend meetings and participate in public events, but only when those activities meet the strict requirements of LOCSD's bylaws and California law. At issue are payments to some directors for attending meetings and participating in district-related business that may not have met the requirements for compensation.

We conclude that some directors were improperly compensated. However, for the reasons explained below we find that these violations do not warrant criminal prosecution. It is highly recommended that directors carefully acquaint themselves with LOCSD bylaws, Government Code section 61047 and other applicable laws when seeking compensation or reimbursement.

Background

In December 2018, a member of the public questioned whether members of the board of directors were improperly compensated. This matter was subsequently addressed in a January 28, 2019 report by (then) General Manager Renee Osborne. In her report she states, "After reviewing the compensation forms, it was found that a few directors had mistakenly asked for compensation that was not covered under the current bylaw." Her report names the directors who were improperly compensated and the amounts received, but notes the directors paid back what they owed.¹ She also attached copies of the forms that directors fill

¹ \$50 owed by one director was waived, as he had passed away.

out when asking for compensation (discussed below). Based on her accounting, the total amount of improper compensation that was owed to the district was \$550.²

As an example, one director attended a Special Board Meeting and a Utility Advisory Committee Meeting on the same day and sought compensation of \$100 per meeting for a total of \$200. This violates LOCSD's bylaws and Government Code section 61047(a), which limits compensation to \$100 per day, regardless of the number of meetings attended.

More recently, the issue of director compensation was raised at the October 3, 2019, regular board meeting. At that time Legal Counsel Jeff Minnery provided background, noting that over several years the district had "slowly deviated from strict compliance with . . . existing bylaws. . . ." Minnery stated that this was a product of "information being passed along from board members to board members, misunderstandings, passed along through years." Minnery emphasized that when the improper compensation was brought to the attention of the directors, they responded in good faith by reimbursing the district. He also mentioned that the San Luis Obispo County District Attorney's Office was conducting an inquiry into the matter.

LOCSD bylaws and California Government Code

LOCSD bylaws permit directors to receive up to \$100 for "each regular, adjourned or special meetings of the Board of Directors, each required training session, each Standing Committee meeting of which said Director is either the Chairperson or Vice Chairperson, each ad Hoc Committee meeting, or other function/meeting attended by him/her as a Director at the direction of the Board of Directors."³ Compensation by directors is capped at \$600 per month and a director may not receive more than \$100 per day. The LOCSD bylaws generally (but not precisely) track Government Code section 61047, which authorizes special districts to compensate board members for each "day of service" they provide.

Government Code section 61047(e) defines a "day of service" as:

- (1) A meeting conducted pursuant to the Ralph M. Brown Act, Chapter 9 (commencing with Section 54950) of Part 1 of Division 2 of Title 5.

² Other estimates have placed this number higher. For purposes of this letter, the District Attorney's Office is accepting as accurate the estimate provided by Ms. Osborne.

³ The bylaws have been amended 22 times since originally adopted in 1998, most recently on February 7, 2019. Amendments over recent years have included minor changes in language addressing compensation for directors. To avoid confusion, the current bylaws will be used as the point of reference.

(2) Representation of the district at a public event, provided that the board of directors has previously approved the member's representation at a board of directors' meeting and that the member delivers a written report to the board of directors regarding the member's representation at the next board of directors' meeting following the public event.

(3) Representation of the district at a public meeting or a public hearing conducted by another public agency, provided that the board of directors has previously approved the member's representation at a board of directors' meeting and that the member delivers a written report to the board of directors regarding the member's representation at the next board of directors' meeting following the public meeting or public hearing.

(4) Representation of the district at a meeting of a public benefit nonprofit corporation on whose board the district has membership, provided that the board of directors has previously approved the member's representation at a board of directors' meeting and the member delivers a written report to the board of directors regarding the member's representation at the next board of directors' meeting following the corporation's meeting.

(5) Participation in a training program on a topic that is directly related to the district, provided that the board of directors has previously approved the member's participation at a board of directors' meeting, and that the member delivers a written report to the board of directors regarding the member's participation at the next board of directors' meeting following the training program.

To the extent Government Code section 61047 imposes requirements that the bylaws do not, directors should always comply with section 61047⁴ or other applicable laws.⁵

⁴ For example, Government Code section 61047(e)(2)-(5) requires directors seeking compensation to provide written reports to the board following attendance at non-Brown Act meeting or events. However, LOCSD bylaws do not require directors to provide written reports when attending such meetings. In these instances, Directors seeking reimbursement should comply with section 61047 and provide written reports. Further, while the bylaws allow compensation to be paid for Ad Hoc meetings, compensation should only be paid for attendance at Ad Hoc (or other) meetings if such meetings satisfy the requirements of section 61047. As stated elsewhere, before seeking compensation for attending any meeting or event, Directors should personally confirm that each requirement of section 61047 has been met.

⁵ For instance, those serving on the governing board of a water district are subject to the rules of the California Water Code (commencing with Water Code section 20200), which are similar to Government

Request for compensation forms

When seeking compensation, directors are required to fill out a document entitled Director's Monthly Request for Compensation for Meeting Attendance. Copies of completed forms pertaining to 2016, 2017 and 2018 were attached to Renee Osborne's January 28, 2019, report. These pre-printed forms provide general direction for what meetings and events are compensable and how much directors are entitled to receive. However, the form does not mirror the requirements of Government Code section 61047. The form states in part:

9.1 Each director is authorized to receive one hundred dollars (\$100.00) as compensation for each regular, adjourned or special meeting of the Board of Directors, each required training session, or other function/meeting attended by him/her as a director and for each day's service rendered as a director by request of the Board of Directors.⁶

The language used here is broad and a plain reading could lead directors to mistakenly assume they are entitled to compensation for a variety of meetings and activities that, while related to district business, are not actually authorized for payment under Government Code section 61047. Examples of non-compensable activities for which compensation was actually sought from the LOCSD include: meeting with fellow directors, meeting with the district manager, meeting with department heads, and meeting with legal counsel for the district.⁷

Code section 61047.4. In any event, for these provisions to apply the governing board must first approve them "by ordinance or resolution."

⁶ This language is taken from the form the district began using in 2017.

⁷ It bears re-emphasizing that section 61047(a) is very precise in identifying when members of a board of directors are entitled to compensation, particularly when directors are participating in non-Brown Act meetings and activities. With respect to non-Brown Act meetings and activities, board members are only entitled to compensation for attending events and meetings when the director is representing the district and only for the following: "at a public event" [section 61047(a)(2)]; "at a public meeting or public hearing conducted by another public agency representation" [section 61047(a)(3)]; and "at a meeting of a public benefit nonprofit corporation on whose board the district has membership" [section 61047(a)(3) *emphasis added*]. Importantly, as to each of these types of events and meetings, compensation is only authorized if the board has "previously approved" the member's attendance at these meetings and events and at the next board meeting the director provides a written report about the meeting or event. The same requirements of preauthorization by the board, of writing and presenting a report to the board apply to attendance at "training programs" [section 61047(a)(5)].

Discussion and recommendations

The primary mandate of the San Luis Obispo District Attorney's Office is to prosecute criminal violations of the law.⁸ The purpose of this correspondence is to answer the question of whether LOCSD board members should be prosecuted for seeking (and receiving) compensation for non-compensable meetings and activities.

The law most applicable to the facts in this matter is Penal Code section 424(a), dealing with misappropriation of public funds. This is a felony offense which carries a term imprisonment of up to four years. Penal Code section 424(a) applies to “. . . every person charged with the receipt, safekeeping, transfer, or disbursement of public moneys, who . . . without authority of law, appropriates the same, or any portion thereof, to his or her own use, or to the use of another. . . .” As those who approve warrants and otherwise direct how LOCSD's funds should be spent, directors fall squarely within this code section.

In addressing Penal Code section 424 and the heightened responsibility of those handling public funds, the California Supreme Court observed the following:

“[P]ublic officers `who either retain custody of public funds or are authorized to direct the expenditure of such funds bear a peculiar and very grave responsibility, and . . . courts and legislatures, mindful of the need to protect the public treasury, have traditionally imposed stringent standards on such officials.” Stark v. Superior Court of Sutter County (2011) 52 Cal.4th 368.

Elsewhere in the Stark decision, the Supreme Court notes that “even in complex situations, public officials and others are nevertheless obligated to act ‘in strict compliance with the law’ (citation). They are expected to take reasonably necessary steps to determine the appropriateness of their conduct.” Stark at 635. At the same time, the Supreme Court recognized that in applying Penal Code section 424(a), public officials “should not be criminally liable for a reasonable, good faith mistake regarding their legal responsibilities.”

In this matter, there is no indication that any director sought compensation while knowing they were not entitled to it. Rather, it appears directors followed the lead of their predecessors and/or district staff and relied on a pattern and practice that had developed over years. When advised of the improper payments, directors repaid what was owed. Although it is the individual director's responsibility to know what is allowed, the agency's forms used to request compensation likely

⁸ California Government Code section 26500 states, “The district attorney is the public prosecutor, except as otherwise provided by law. The public prosecutor shall attend the courts, and within his or her discretion shall initiate and conduct on behalf of the people all prosecutions for public offenses.”

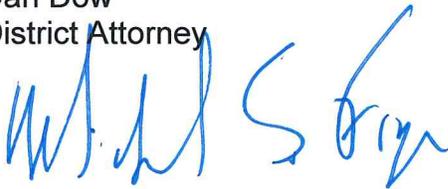
led directors to believe they were entitled to compensation for meetings and events when they were not.

Of importance, the compensation in question was for district-related business and from which, presumably, the district benefitted. Considering the circumstances presented, it appears some directors improperly sought compensation, but as the product of a good-faith, reasonable mistake of fact. Further, each director who was improperly compensated has since paid back those amounts. Based on the totality of these circumstances, the District Attorney's Office will not pursue a criminal prosecution.

As noted above, directors are hereby implored to become thoroughly knowledgeable of LOCSD bylaws and Government Code section 61047 and to strictly comply with these requirements when seeking compensation in the future. Any subsequent unauthorized requests for compensation will be examined closely and may be prosecuted as violations of Penal Code sections 424 and/or 504.

Sincerely,

Dan Dow
District Attorney



By: Michael S. Frye
Deputy District Attorney
Public Integrity Unit
County of San Luis Obispo, State of California