

BOARD MEMBER PERSONAL LIABILITY

DANNY WAN
PORT ATTORNEY
PORT OF OAKLAND
AAPA LAW REVIEW COMMITTEE

*When your actions
can expose you personally
to civil or even criminal liability*



America Association of Port Authorities
Port Governing Boards Seminar
June 20, 2018

Who's Presenting

Danny Wan has been the general counsel of the Port of Oakland since 2012. As Port Attorney, I advise and report directly to the Board of Port Commissioners. Prior to that, I served as City Attorney for Morgan Hill, a city located in the Silicon Valley. I have also served as an elected official, being a member of the Oakland City Council from 2000-2004. Currently, I am a vice chair of the AAPA law review committee which functions as a legal education and advocacy arm of the AAPA.

Port of Oakland is an independent department of the City of Oakland governed by the Board of Port Commissioners to own, maintain, and operate the tidelands areas of the City for a maritime port, airport and commercial real estate. Members of the seven-member Board are nominated by the Mayor and then appointed by the City Council, but the Board's powers are independent of the City Council's.

Scope of Presentation

The presentation is an overview of common principles in most American and Canadian jurisdictions relating to certain issues of personal liability for public officials in governing roles. “Personal liability” may mean civil damages, criminal penalties or court order of mandates. Specific laws and regulations relating to public official immunity and liability vary from jurisdiction to jurisdiction. This presentation is designed to help governing board members spot possible issues in carrying out their duties and should not be taken as legal advice. Consult your agency counsel on specific situations.

Good News First: you are generally immune from personal liability when doing your job as board member



A public official is generally immune from liability for any **legislative or discretionary** act taken **in good faith** and **in the course of performing official duties** authorized by law.

- 👍 Actions during legislative process, board meetings, including discussions, votes, and directions to staff.
- 👍 Decisions to hire or pay staff directors or managers within the Board's hiring authority.
- 👍 Decisions (authorized by law) to enact regulations, enter into leases, contracts, enact fees, or to issue/deny permits.

But! There is no immunity for actions that are administrative or that are violation of law



Immunity from liability does not apply to public officials' administrative actions or actions/omissions that are in violation of law. Failure to fulfil duty or Improper ministerial acts may result in personal liability.

- ▲ Failure to take actions mandated by law (e.g. adoption of budget or file financial interest disclosure form) can result in court mandates.
- ▲ Taking actions that are administrative in nature can result in personal liability (e.g. receiving or making payments from or to port contractor).
- ▲ Failure to follow process and procedures (e.g. public notice for meetings) may result in court mandates.

Board member may be personally liable for actions outside the scope of authority



Actions taken outside the scope of a board member's authority may result in personal liability.

- ⚠ Individual board members who make promises or representations to a member of public without the proper authority from the whole board may be acting outside of authority and liable for damages for reliance on the misrepresentation.
- ⚠ Actions outside of scope of authority may be excluded from indemnity by the agency or coverage by insurers.

Board member is personally liable for fraud, intentional misconduct or malice



Where a board member causes injury, or incurs punitive damages, fines or criminal penalties due to fraud, or intentional or malicious misconduct, he/she is personally liable.

- ⦿ A board member who is found to have intentionally or maliciously sexually harassed or taken racially discriminatory actions against a subordinate, agency employee, a contractor is personally liable.
- ⦿ Actions taken to deprive someone's constitutional or statutory rights or retaliate for the exercise of those rights (e.g. deny permit or contract because of speech or lawsuit) may result in personal liability.



Do's and Don'ts

DO

- ☛ Adopt policy indemnifying board members to the “fullest extent allowed by law” for liabilities and expenses arising from conduct within the scope of member’s authority.
- ☛ Purchase public officials’ (directors and officers, or errors and omissions) insurance.

Don't

- ☹ Take actions, make promises, enter into agreements on behalf of the Port without Board authorization and outside of scope of authority.
 - ☹ Engage in administrative action or direct non-executive staff without coordination with senior management.
 - ☹ Discriminate against or retaliate for a person’s exercise of his/her rights.
-

Corruption and conflict of interest are clear areas of personal liability and public embarrassment



- ⊗ Giving and receiving bribes (exchanging votes, opinion or official action for personal gain) is criminal offense .
- ⊗ Conflict of interest codes and regulations prohibit official actions that benefit a board member or requires interested board member's "recusal".
- ⊗ Violation of conflict of interest codes can lead to criminal or civil liability, and maybe voiding decision of the Board.



Conflict of Interest Code a California example

- Basic Rule: A public official may **not make, participate in making, or in any way use or attempt to use** his or her official position to influence a governmental decision when that the decision will have a **reasonably foreseeable material financial effect**, distinguishable from the effect on the public generally, directly on the official, or **his or her immediate family, or on any financial interest**.
 - Prohibition against self-dealing: Public officials may 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. (e.g. City bought property that city council member has ownership stake in. Court made council member give money back , but city kept the land).
-

Board member is personally liable for use of public funds for personal purposes or for improper political purposes



- ⊘ Using or permitting others to use public resources for a campaign activity, or personal or other purposes which are not authorized by law is prohibited (California Government Code 8314).
- ⊘ Using public funds for partisan election or advocacy of election ballot vote is abuse of public resources.
- ⊘ Personal liability if public official fails to exercise due care in authorizing or intentionally authorizes the improper expenditure.



Case Study

- In 2010, the Los Angeles Times published report that the City of Bell in California (population 38,000) paid its City Administrator, Mr. Rizzo, \$787,500 in base salary in 2010. In 2008, when other city employees were being laid off, Rizzo received five new employment contracts providing for 12 percent annual increases to his salary, double retirement benefits, 107 vacation days and 36 days of sick leave (out of approximately 250 working days) per year. In 2009, Rizzo sold back over 130 days of leave time for over \$360,000, bringing his total salary for that year to a total in excess of \$1.1 million. At the same time, the assistant city administrator was paid \$336,000 in 2010 and the police chief was paid \$457,000.
- Rizzo's 2008 contracts were procedurally unauthorized; the contracts were not approved by the city council; instead, they were signed by one councilmember, who signed as the purported mayor. However, that councilmember was not the mayor at the time.
- City Charter requires paying City Administrator "salary commensurate" with duty.

- Bell's council members in 2010 were scheduled to received \$8,000 per month in salary when, under state law, a city of its size was allowed to pay its council members no more than \$400 per month.
 - The City Council passed an ordinance that was misleadingly titled as an ordinance "limiting compensation for members of the City Council," but that nearly doubled council member compensation.
 - In September 2008, at Rizzo's direction, a memorandum was prepared to be given by the city clerk to any member of the public who inquired about the salaries of city officers and employees. The memorandum falsely stated that Councilmember defendants were paid \$673 per month, when they were actually paid \$7,600 per month, and that Rizzo was paid \$15,478 per month, when he was actually paid over \$52,000 per month.
-

- Rizzo and Council also developed a “Supplemental Retirement Plan”, which provided retirement benefits to a small group of City officers and employees, including the City Administrator and the police chief. Rizzo and the police chief modified the terms of the retirement plan to provide unique benefits to them that were not available to other members of the retirement plan.
 - The city also made various loans to themselves.
-

- **Excessive Compensation:** Are the city councilmembers protected from liability under discretionary immunity for establishing compensation by ordinance?
 - **Fraud:** Can the council members be held liable for passing a misleading ordinance that purported limited their salaries but instead, doubled it?
 - **Fraud:** Can Rizzo be held liable for issuing a false public memorandum misrepresenting the compensation levels of city council and administration compensation?
 - **Conflict of Interest:** Can Rizzo be liable for self-dealing for changing the pension plan to directly and uniquely benefit himself and his direct reports?
 - **Indemnity:** Are Rizzo or council members entitled to indemnity by the City?
-

- **Excessive Compensation:** Council members could not be held liable for passing ordinances approving employment contracts; however, they were liable for setting salaries higher than their authority allows. Council members and officials had to pay restitution and were guilty of misappropriation of public funds.
 - **Fraud:** Council members could not be held liable for language of the ordinance even if misleading because legislative immunity applies.
 - **Fraud:** Rizzo was liable for the administrative act of issuing fraudulent public memorandum. In addition to possible civil damages, Rizzo was also criminally charged with falsification of public records and misappropriation of public funds.
 - **Conflict of Interest:** Rizzo and executives were liable civilly and criminally for self-dealing by making decision to increase pension for themselves.
 - **Indemnity:** Even if indemnity agreement between Rizzo and City provided for defense and indemnity (which it did not), City may not indemnify an employee against criminal actions taken with bad faith and malice.
-

Public right to know in the electronics age may reach into your private electronic space



Every jurisdiction has some form of requirement for the disclosure of agency information or documents variously known as “Freedom of Information” or “Public Records” laws. In the age of the proliferation of electronic communication, “Disclosure” is no longer limited to papers filed in a box, but thousands of images in the “cloud”



“Public”
documents you
may never
intend to be
“public”



- ⚠ Emails, emails everywhere
(copies of emails multiple geometrically)
- ⚠ Your “personal devices” may not be so personal (California Supreme Court: messages in your PDA may be public)
- ⚠ Your Facebook Page is limited to your “friends”. Not if you are discussing the public’s business!
- ⚠ “Cyber security” is an oxymoron
- ⚠ I can always delete – not really! (deletion of public records without a policy may be a crime!)



Do's and Don'ts

DO

- ☛ Adopt an official records retention policy that allows for deletion in an systematic and lawful fashion – including emails.
- ☛ Keep all communications about Port business on official servers and platforms where they are easily managed.
- ☛ Train all employees about how to keep records and avoid cyber security risks.

Don't

- ☹ Discuss Port business using social media, personal email accounts or “private” blogs.
 - ☹ Send emails with sensitive, embarrassing or potentially incriminating information or statement.
-