State of California • Department of General Services • Jerry Brown, Governor
INTERAGENCY SUPPORT DIVISION
OFFICE OF ADMINISTRATIVE HEARINGS

# Memorandum

To: Fair Political Practices Commission
428 J Street, Suite 620
Sacramento, CA 95814
Attn: Roman G. Porter
Executive Director

Date: December 19, 2014

Case No.: 12/516
OAH No.: 2014060674

From: Office of Administrative Hearings
320 West Fourth Street, 6th Floor, Suite 630
Los Angeles, CA 90013
ATSS (8) 649-7200 (213) 576-7200

Subject: FRANK J. BURGESS

Enclosed is the following material pertaining to the above captioned matter:

( X ) The original of the Proposed Decision.

( X ) An agency order of adoption. If the Proposed Decision is adopted, please send the Office of Administrative Hearings a copy of the signed order of adoption upon adoption of the Decision.

( ) The original of the Decision.

( X ) Exhibits numbered: ***Please see attached Exhibit Lists***
Please make sure you have received all exhibits listed above. For missing exhibits, please contact OAH immediately at the phone number listed above.

( ) Protest(s)

ref
Encl.

Transmittal Form
OAH 60 (Rev. 9/89)

BEFORE THE
FAIR POLITICAL PRACTICES COMMISSION
STATE OF CALIFORNIA

| | |
|---|---|
| In the Matter of | Case No.: 12/516 |
| FRANK J. BURGESS | OAH No.: 2014060674 |
| Respondent. | |

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Fair Political Practices Commission as its Decision in the above-entitled matter.

This Decision shall become effective _____.

IT IS SO ORDERED _____.

FAIR POLITICAL PRACTICES COMMISSION
STATE OF CALIFORNIA

By _____

ref

# OFFICE OF ADMINISTRATIVE HEARINGS

State of California

## EXHIBIT / WITNESS LIST

OAH 23 (rev. 2/03)

OAH No. 2014060674

Agency No. 59

ALJ: H. Stuart Waxman

*Agency / Complainant:* FPPC

*Attorney / Rep.:* *Angela J. Brereton*

*Case Name / Respondent:* Frank J. Burgess

*Attorney / Rep.:* *Frank J. Burgess in pro per*

| Marked for I.D. | Hearing Dates: Evidence Offered – (via Witness) | Evidence Admitted Date –All – Jurisdiction | Marked for I.D. | Evidence Offered – (via Witness) | Evidence Admitted Date –All – Jurisdiction |
|---|---|---|---|---|---|
| 1. | Brief | | A. | Section 4.16 | X |
| 2. | Accusation and accompanying documents | Jurisdictional purposes | B. | Agenda for Executive Committee 4/14/10 meeting | X |
| 3. | Notice of Defense | Jurisdictional purposes | C. | Public Records Request Response | X |
| 4. | Notice of Hearing | Jurisdictional purposes | D. | Handwritten notes and invoice | X |
| 5. | Form 700s; Conflict of Interest Statements, By-laws, Documents relating to 4/6/10 meeting | X | E. | Sworn Complaint form | X |
| 6. | Board minutes | X | F. | 6/11/10 newspaper article | X |
| 7. | Documents re Banning Van & Storage | X | G. | 5/16/10 newspaper article | X |
| 8. | Documents from Riverside County Clerk | X | H. | 5/6/10 letter from Porter | X |
| 9. | Withdrawn | | I. | Check No. 2051 | X |
| 10. | Withdrawn | | J. | 6/17/10 fax cover sheet | X |
| 11. | Withdrawn | | K. | e-mails | X |
| 12. | Withdrawn | | L. | 11/11/10 fax cover sheet | X |
| 13. | Withdrawn | | M. | Part of claim form | X |
| 14. | Withdrawn | | N. | Bay Citizen Article | X |
| 15. | Organizational Structure | Off Not | O. | E-mail from Brereton | X |
| 16. | Duaime commission penalty | Off Not | P. | Investigation Report No. 1 2/7/13 | X |
| 17. | Coyne commission penalty | Off Not | Q. | Investigation Report No. 6 2/19/13 | X |
| 18. | Oliva commission penalty | Off Not | R. | 6/28/13 letter from Respondent | X |
| 19. | Watson commission penalty | Off Not | S. | Financial Disqualification Rules | X |
| 20. | Mark commission penalty | Off Not | T. | Email from Todd Burgess to Respondent | X |
| 21. | Leeson commission penalty | Off Not | U. | Public records request and response | X |
| 22. | Cole commission penalty | Off Not | V. | Grand Jury Report | Irrelevant |

| | | | | | |
|---|---|---|---|---|---|
| 23. | Martinez commission penalty | Off Not | W. | 5/25/12 letter from Respondent | Irrelevant |
| 24. | Dengler commission penalty | Off Not | X. | Newspaper article | Irrelevant |
| 25. | | | Y. | | |
| 26. | | | Z. | | |
| 27. | | | AA. | | |
| 28. | | | BB. | | |
| 29. | | | CC. | | |
| 30. | | | DD. | | |
| 31. | | | EE. | | |
| 32. | | | FF. | | |
| 33. | | | GG. | | |
| 34. | | | HH. | | |
| 35. | | | II. | | |
| 36. | | | JJ. | | |
| 37. | | | KK. | | |
| 38. | | | LL. | | |
| 39. | | | MM. | | |
| 40. | | | NN. | | |
| 41. | | | OO. | | |
| 42. | | | PP. | | |

| COMPLAINANT WITNESSES | RELEASED | RESPONDENT WITNESSES | RELEASED |
|---|---|---|---|
| 1. | | 1. | |
| 2. | | 2. | |
| 3. | | 3. | |
| 4. | | 4. | |
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| 10. | | 10. | |

BEFORE THE
FAIR POLITICAL PRACTICES COMMISSION
STATE OF CALIFORNIA

| | |
|---|---|
| In the Matter of<br><br>FRANK J. BURGESS<br><br>Respondent. | Case No. 12/516<br><br>OAH No. 2014060674 |

## PROPOSED DECISION

This matter came on regularly for hearing on December 8 and 9, 2014, in Los Angeles, California, before H. Stuart Waxman, Administrative Law Judge, Office of Administrative Hearings, State of California.

The Fair Political Practices Commission (Complainant or FPPC) was represented by Angela J. Brereton, Senior Commission Counsel, and Adam Edward Silver, Commission Counsel.

Frank J. Burgess was present and represented himself.

Oral and documentary evidence was received. The record was closed on December 9, 2014, and the matter was submitted for decision.

Pursuant to California Code of Regulations, title 2, section 18361.4, subdivision (e), the Accusation in this case was prepared and served following a February 18, 2014 finding of probable cause that Respondent violated provisions of the Political Reform Act (Gov. Code, § 81000 et seq.).

## FACTUAL FINDINGS

1. San Gorgonio Memorial Hospital (hospital) is a 71-bed acute care hospital located in Banning, California. It operates as a California nonprofit 501(c)(3) public benefit corporation. It is owned by the San Gorgonio Memorial Healthcare District (district), a political subdivision of the State of California. The hospital leases its land, building, and equipment from the district under a long-term lease.

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2. The hospital is, and at all relevant times was, governed by two boards. The San Gorgonio Memorial Healthcare District Board (district board) consists of five elected members. It is a public agency and, as such, each member is a public official who must file with the FPPC an annual "Form 700" Statement of Economic Interests, disclosing sources of income and other economic interests that could actually or potentially trigger a conflict of interest with the member's official duties. The San Gorgonio Memorial Hospital Board (hospital board) is comprised of 13 members, five of whom are the district board members. Because the other eight members sit with the five district board members, the hospital board is also considered a public agency, and all 13 board members must file Statements of Economic Interests annually.

3. From June 2009 through December 2010, Respondent was a member of the district board. As a member of that board, he was also a member of the hospital board. Prior to his sitting on the district and hospital boards, Respondent was a member of the Banning City Council for 12 years.

4. Respondent has also been a businessman for over 40 years. At all relevant times, he was President and Chief Executive Officer (CEO) of Banning Van & Storage, Inc., dba Burgess North American (BNA), a company engaged in the business of moving and storage. Initially incorporated in 1964, BNA's officers included Respondent as President and his wife as Secretary. As of January 2010, Respondent's son, Todd Burgess was BNA's secretary following Mrs. Burgess's death. Respondent oversaw the Banning office. Todd Burgess oversaw the Palm Springs office.

5. Respondent regularly reported his financial interest in BNA in all of his annual Statements of Financial Interests.

6. In April 2005, the hospital entered into a contract with BNA for BNA to store and manage the hospital's records. The term of the contract was indefinite, and the contract did not include an expiration date. The hospital paid BNA for its services pursuant to a specified Schedule of Charges. BNA's annual income from the account exceeded $30,000. The contract was in full force and effect at all relevant times.

7. In or around April 2010, the hospital board considered reducing its medical record storage and management costs either by negotiating a new rate with BNA or by terminating the contract with BNA and entering into a contract with another company. A comparison was made between BNA and a company named Docu-Trust. The results of that comparison showed that the hospital could realize a 24.54 percent annual savings, totaling $7,767.95, by contracting with Docu-Trust instead of BNA. An item was placed on the hospital board's agenda for the April 6, 2010 meeting for the hospital board to decide whether to terminate BNA's contract in favor of one with Docu-Trust.

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8. Prior to the April 6, 2010 meeting, Respondent and/or his son prepared a 10-page packet of materials relating to the hospital board's choice between BNA and Docu-Trust. The packet contained eight sections, including but not limited to "Questions to be addressed Before voting [*sic*];" "Fees due prior to removal Of Containers [*sic*]; "Corrected annual cost comparison" [*sic*]; and a schedule of charges for the hospital's account.

9. On April 6, 2010, the district board met before the meeting of the hospital board. The two meetings were separated by a dinner break. During the dinner break, Respondent placed the packet of materials at the place of each of the 13 members of the hospital board. Respondent had not attempted to have the packet placed with the agenda materials that had been prepared for the meeting. Roberta (Bobbi) Duffy, the executive assistant to the hospital's CEO, saw Respondent distributing the packet for the hospital board members and told him she had to make a copy of it. Respondent gave her one of the packets for that purpose.

10. In April 2010, Jerilynn Sue Kaibell was the Chair of the hospital board. She continues to hold that position today. Prior to the April 6, 2010 board meeting, Dr. Kaibell[1] spoke with Respondent concerning the agenda item relating to his company and told him he should refrain from the discussion and abstain from the vote due to his conflict of interest. She recommended to Respondent that he be absent from the room during the discussion and vote. Dr. Kaibell observed Respondent distributing his packet before the hospital board meeting, and she chastised him for lobbying the board members on his company's behalf. When the agenda item was called, Respondent did not exit the room. Instead, he remained in his board member's seat, and he attempted to speak to the board members about the packet while holding the packet up in his hand. Dr. Kaibell repeatedly called him out of order because of his conflict of interest. Respondent abstained from the vote, and the contract with Docu-Trust was unanimously approved with abstentions by Respondent and one other board member.

11. Respondent admits he prepared and distributed the packet for the hospital board members, but claims he did so because the chart used to compare BNA and Docu-Trust was incomplete, inaccurate, and untrue. At the administrative hearing, Respondent continuously argued that he had not been dishonest in connection with his actions relating to the hospital board's April 6, 2010 meeting. Respondent's protestations in that regard are misplaced. He is not alleged to have been dishonest.

12. Respondent raised a number of issues in his defense, none of which was relevant to the sole issue alleged in the Accusation, specifically, that he attempted to use his official position to influence a governmental decision in which he had a financial interest. Respondent now describes his actions on April 6, 2010 as "a big mistake." (Respondent's term.) He regrets having made it.

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[1] Dr. Kaibell is a doctor of chiropractic.

## LEGAL CONCLUSIONS

1. Cause exists to impose a monetary penalty against Respondent pursuant to Government Code sections 87100 and 83116, subdivision (c), for attempting to use his official position to influence a governmental decision in which he had a financial interest, as set forth in Factual Findings 1 through 12.

2. Complainant bears the burden of proof in this case. (*Parker v. City of Fountain Valley* (1981) 127 Cal.App.3d 99, 113.) The standard of proof is a preponderance of the evidence. (Evid. Code, § 115; Cal. Code Regs., tit. 2, § 18361.5, subd. (c).)

3. Government Code section 87100 states:

> No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.

4. Government Code section 83116 states:

> When the [Fair Political Practices] commission determines there is probable cause for believing this title has been violated, it may hold a hearing to determine if a violation has occurred. Notice shall be given and the hearing conducted in accordance with the Administrative Procedure Act (Chapter 5 (commencing with Section 11500), Part 1, Division 3, Title 2, Government Code). The commission shall have all the powers granted by that chapter. When the commission determines on the basis of the hearing that a violation has occurred, it shall issue an order that may require the violator to do all or any of the following:
>
> (a) Cease and desist violation of this title.
>
> (b) File any reports, statements, or other documents or information required by this title.
>
> (c) Pay a monetary penalty of up to five thousand dollars ($5,000) per violation to the General Fund of the state. When the Commission determines that no violation has occurred, it shall publish a declaration so stating.

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5. Respondent argued that he is not subject to the provisions of Government Code sections 87100 and 83116, subdivision (c) because he was serving on the board of directors of a private, non-profit corporation at the time he distributed the packet, and that the hospital board was not subject to the Political Reform Act. He is incorrect. Respondent's duties as a member of the district board included his service on the hospital board. Because the district board members all served on the hospital board, all hospital board members were required to submit Statements of Economic Interests annually.

6. Government Code section 87103 states in pertinent part:

> A public official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any of the following:
>
> (a) Any business entity in which the public official has a direct or indirect investment worth two thousand dollars ($2,000) or more.
>
> [¶] . . . [¶]
>
> (c) Any source of income, except gifts or loans by a commercial lending institution made in the regular course of business on terms available to the public without regard to official status, aggregating five hundred dollars ($500) or more in value provided or promised to, received by, the public official within 12 months prior to the time when the decision is made.
>
> (d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management. . . .

7. California Code of Regulations, title 2, section 18702.2, states:

> A public official "participates in making a governmental decision," except as provided in Title 2, California Code of Regulations, section 18702.4, when, acting within the authority of his or her position, the official:
>
> (a) Negotiates, without significant substantive review, with a governmental entity or private person regarding a governmental decision referenced in Title 2, California Code of Regulations, section 18701(a)(2)(A); or

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(b) Advises or makes recommendations to the decisionmaker either directly or without significant intervening substantive review, by:

(1) Conducting research or making any investigation which requires the exercise of judgment on the part of the official and the purpose of which is to influence a governmental decision referenced in Title 2, California Code of Regulations, section 18701(a)(2)(A); or

(2) Preparing or presenting any report, analysis, or opinion, orally, or in writing, which requires the exercise of judgment on the part of the official and the purpose of which is to influence a governmental decision referenced in Title 2, California Code of Regulations, section 18701(a)(2)(A).

8. Complainant offered a six-element analytical construct by which to determine whether an individual has violated Government Code section 87100. Although the use of the above construct is not mandated by statute or regulation, it serves as a useful tool in determining liability under that statute. Accordingly, each of the above elements is analyzed below. The elements are:

a. The individual must have been a public official as defined by the Political Reform Act.

b. The individual must have made, participated in making, or attempted to use his/her official position to influence a governmental decision.

c. The individual must have had an economic interest in the business entity in question.

d. The individual's economic interest must have been directly involved in the governmental decision.

e. The financial effect of the decision on the individual's economic interest was material.

f. The material financial effect was reasonably foreseeable.

9. *Was Respondent a public official?* Yes. Government Code section 82048 defines a "public official" as "every member, officer, employee or consultant of a state or local government agency." The district was a political subdivision of the State of California. As a member of the district's board of directors, Respondent was a public official. Because Respondent's membership on the hospital board was directly derivative of his district board membership, he (along with the other hospital board members) was a public official even when sitting on the hospital board.

10. *Did Respondent make, participate in making, or attempt to use his official position to influence a governmental decision?* Yes.

a. California Code of Regulations, title 2, section 18702.3, subdivision (a), states:

> With regard to a governmental decision which is within or before an official's agency or an agency appointed by or subject to the budgetary control of his or her agency, the official is attempting to use his or her official position to influence the decision if, for the purpose of influencing the decision, the official contacts, or appears before, or otherwise attempts to influence, any member, officer, employee or consultant of the agency. Attempts to influence include, but are not limited to, appearances or contacts by the official on behalf of a business entity, client, or customer.

b. An exception to this rule exists for a public official who acts as a member of the public in a matter relating solely to his/her personal interests: California Code of Regulations, title 2, section 18702.4, provides in relevant part:

> (a) Making or participating in making a governmental decision shall not include:
>
> [¶] . . . [¶]
>
> (2) Appearances by a public official as a member of the general public before an agency in the course of its prescribed governmental function to represent himself or herself on matters related solely to the official's personal interests as defined in Title 2, California Code of Regulations, section 18702.4(b)(1) . . .
>
> [¶] . . . [¶]
>
> (b) Notwithstanding Title 2, California Code of Regulations, section 18702.3(a), an official is not attempting to use his or her official position to influence a governmental decision of an agency covered by that subsection if the official:
>
> (1) Appears in the same manner as any other member of the general public before an agency in the course of its prescribed governmental function solely to represent himself or herself on a matter which is related to his or her personal interests. An official's "personal interests" include, but are not limited to:
>
> [¶] . . . [¶]

(B) A business entity wholly owned by the official or members of his or her immediate family.

c. Here, Respondent used his official position to enter the meeting room between board meetings, distribute his packets, remain in his official seat during the discussion and the vote, and verbally lobby the hospital board to retain his company as the hospital's record storage provider. Respondent's conduct on April 6, 2010 does not qualify for the exception referenced in subdivision (b) above. By his conduct, he acted in his official capacity and not as a member of the general public.

11. *Did Respondent have an economic interest in the governmental decision?* Yes.

a. California Code of Regulations, title 2, section 18703.3, subdivision (a), states:

> (a)(1) For purposes of disqualification under Sections 87100 and 87103, a public official has an economic interest in any person from whom he or she has received income, including commission income and incentive compensation as defined in this regulation, aggregating five hundred dollars ($500) or more within 12 months prior to the time when the relevant governmental decision is made. A public official's income includes income which has been promised to the public official but not yet received by him or her, if he or she has a legally enforceable right to the promised income.
>
> (2) Parent, Subsidiary, Otherwise Related Business Entity. An official has an economic interest in a business entity which is a parent or subsidiary of, or is otherwise related to, a business entity in which the official has an interest as defined in Section 87103(c). "Parents, subsidiaries, and otherwise related business entities" are defined in Regulation 18703.1(d).
>
> (3) In addition to having an economic interest in any business entity from which the official has received income of five hundred ($500) or more within 12 months prior to the time when the relevant governmental decision is made, the official has a source-of-income economic interest in all of the following:
>
> (A) Any individual owning a 50 percent or greater interest in that business entity.
>
> (B) Any individual, regardless of the extent of the individual's ownership interest in that entity, who has the power to direct or cause the direction of the management and policies of the business entity.

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b. California Code of Regulations, title 2, section 18703.5 states:

> For purposes of disqualification under Government Code sections 87100 and 87103, a public official has an economic interest in his or her personal finances and those of his or her immediate family. A governmental decision will have an effect on this economic interest if the decision will result in the personal expenses, income, assets, or liabilities of the official or his or her immediate family increasing or decreasing.

c. In April 2010, Respondent and his son were the sole owners of BNA. As president and CEO of the corporation, Respondent had an economic interest in the hospital board's decision whether to terminate the hospital's contract with BNA.

12. *Was Respondent's economic interest directly involved with the governmental decision?* Yes.

a. California Code of Regulations, title 2, section 18704.1, subdivision (a), states in relevant part:

> (a) A person, including business entities, sources of income, and sources of gifts, is directly involved in a decision before an official's agency when that person, either directly or by an agent:
>
> [¶] . . . [¶]
>
> (2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person.

b. Respondent's company was the subject of the April 6, 2010 agenda item relating to the hospital's record storage. As such, Respondent's economic interest was directly involved with the governmental decision.

13. *Was the financial effect of the governmental decision material to Respondent's economic interest?* Yes.

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a. California Code of Regulations, title 2, section 18705.1, states in pertinent part:

(a) Introduction.

(1) If a business entity in which a public official has an economic interest is directly involved in a governmental decision (see Regulation 18704.1(a)), use the standards in subdivision (b) of this regulation.

(2) If a business entity in which a public official has an economic interest is indirectly involved in a governmental decision (see Regulation 18704.1(b)), use the standards in subdivision (c) of this regulation.

(b) Directly involved business entities.

(1) General Rule: Unless the exception in subdivision (b)(2) of this regulation applies, the financial effects of a governmental decision on a business entity which is directly involved in the governmental decision is presumed to be material. This presumption may be rebutted by proof that it is not reasonably foreseeable that the governmental decision will have any financial effect on the business entity.

(2) Exception: If the public official's only economic interest in the business entity is an investment interest (see Section 87103(a)), and the public official's investment in the business entity is worth $25,000 or less, apply the materiality standards in either of the following provisions, as applicable:

(A) Subdivision (c)(1) of this regulation if the business entity is listed in the Fortune 500, or if not listed in the Fortune 500, has revenues that are no less than the revenues of the business entity that ranks 500th in the Fortune 500 list.

(B) Subdivision (c)(2) of this regulation if the business entity is listed on the New York Stock Exchange, or if not listed on the New York Stock Exchange, for its most recent fiscal year had net income of no less than $2.5 million.

b. Respondent had more than an investment interest in BNA. He was the company's president and CEO, and he had been so since 1964. The exception in California Code of Regulations, title 2, section 18705.1, subdivision (b)(2) does not apply in this case, and the presumption in subdivision (b)(1) is not rebutted.

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14. *Was the material financial effect of the governmental decision on Respondent's economic interest reasonably foreseeable?* Yes.

a. California Code of Regulations, title 2, section 18706, subdivision (a), states:

> (a) Economic Interest Explicitly Involved: A financial effect on an economic interest is presumed to be reasonably foreseeable if the economic interest is a named party in, or the subject of, a governmental decision before the official or the official's agency. An economic interest is the subject of a proceeding if the decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the economic interest, and includes any governmental decision affecting a real property economic interest as described in Regulation 18705.2(a)(1)-(6).

b. The governmental decision in this case involved the revocation, termination, or continuance of the contract between the hospital and Respondent's company. Respondent did not rebut the presumption of reasonable foreseeability.

c. Even if Respondent's economic interest in the decision was not explicitly involved in the decision, the financial effect of the decision on his economic interest would nonetheless have been reasonably foreseeable. California Code of Regulations, title 2, section 18706, subdivision (b), states:

> Economic Interest Not Explicitly Involved in Decision: A financial effect need not be likely to be considered reasonably foreseeable. In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official's control, it is not reasonably foreseeable. In determining whether a governmental decision will have a reasonably foreseeable financial effect on an economic interest other than an interest described in subdivision (a) above, the following factors should be considered. These factors are not intended to be an exclusive list of all the relevant facts that may be considered in determining whether a financial effect is reasonably foreseeable, but are included as general guidelines.
>
> (1) The extent to which the occurrence of the financial effect is contingent upon intervening events, not including future governmental decisions by the official's agency, or any other agency appointed by or subject to the budgetary control of the official's agency.
>
> (2) Whether the public official should anticipate a financial effect on his or her economic interest as a potential outcome under normal circumstances when using appropriate due diligence and care.

(3) Whether the public official has an economic interest that is of the type that would typically be affected by the terms of the governmental decision or whether the governmental decision is of the type that would be expected to have a financial effect on businesses and individuals similarly situated to those businesses and individuals in which the public official has an economic interest.

(4) Whether a reasonable inference can be made that the financial effects of the governmental decision on the public official's economic interest could compromise the public official's ability to act in a manner consistent with his or her duty to act in the best interests of the public.

(5) Whether the governmental decision will provide or deny an opportunity, or create an advantage or disadvantage for one of the official's economic interests, including whether the economic interest may be entitled to compete or be eligible for a benefit resulting from the decision.

(6) Whether the public official has the type of economic interest that would cause a similarly situated person to weigh the advantages and disadvantages of the governmental decision on his or her economic interest in formulating a position.

(d) Respondent stood to lose a lucrative contract with the hospital if the hospital board voted to change storage companies to Docu-Trust. Knowing this, he prepared and distributed his packet to the other board members and then attempted to orally lobby them at the meeting before the vote. Respondent not only had an economic interest in the vote, the financial effect on that interest by the board's decision was more than reasonably foreseeable.

15. Cause for imposing a monetary penalty on Respondent having been established, several factors must be considered in determining the amount of the penalty.

16. California Code of Regulations, title 2, section 18361.5, subdivision (d), states:

Factors to be Considered by the Commission. In framing a proposed order following a finding of a violation pursuant to Government Code section 83116, the Commission and the administrative law judge shall consider all the surrounding circumstances including but not limited to:

(1) The seriousness of the violation;

(2) The presence or absence of any intention to conceal, deceive or mislead;

(3) Whether the violation was deliberate, negligent or inadvertent;

(4) Whether the violator demonstrated good faith by consulting the Commission staff or any other government agency in a manner not constituting a complete defense under Government Code section 83114(b);

(5) Whether the violation was isolated or part of a pattern and whether the violator has a prior record of violations of the Political Reform Act or similar laws; and

(6) Whether the violator, upon learning of a reporting violation, voluntarily filed amendments to provide full disclosure.[2]

17. The violation was serious in that it involved Respondent's direct attempt to influence the hospital board into maintaining a lucrative contract with the company of which he had been president for 46 years. Although he made no attempt to deceive or mislead the board or to conceal any fact from it, his actions were neither negligent nor inadvertent. Respondent acted deliberately with no attempt or intent to consult the Commission staff or any other government agency before preparing and distributing the packet and attempting to lobby the board members. In fact, he did so over the repeated admonishments of the Chair. The only mitigating factors are the fact that Respondent's actions constituted a single, isolated incident in an otherwise long and distinguished career in public service and private enterprise, and his remorse for his actions on April 6, 2010. However, in light of the nature and blatancy of Respondent's conduct, those factors are insufficient to warrant a reduction of the monetary penalty from the maximum amount allowable by law, specifically, $5,000 for the single violation. (Gov. Code, § 83116, subd. (c).)

## ORDER

Respondent, Frank J. Burgess, shall pay a penalty of $5,000 to the General Fund of the State of California within 90 days of the effective date of this Decision.

Dated: December 18, 2014

H. STUART WAXMAN
Administrative Law Judge
Office of Administrative Hearings

[2] Factor No. 6 is not applicable to this case.