



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION

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To: Chair Miadich

From: Dave Bainbridge, General Counsel
Kevin Cornwall, Counsel, Legal Division

Subject: Enforcement Chief and Executive Director Dual Roles; Duties to be Delegated

Date: July 22, 2020

Question

Can the FPPC Enforcement Chief also perform the duties of the FPPC Executive Director temporarily? If so, what duties need to be delegated?

Answer

Yes, an official acting as Chief of the Enforcement Division can also hold the position of Executive Director of the FPPC if certain duties are delegated. The Administrative Procedures Act (APA) and basic due process precepts do not prohibit an agency official from taking on two roles at the same time and within the same agency. However, in taking on such a dual role, the official and the agency must take significant caution to ensure that APA and due process requirements are upheld. Due process considerations and the APA prohibit administrative agencies from conducting adjudicative proceedings where an agency official acts as a prosecutor as well as an adjudicator or advisor to an adjudicator if the dual role would result in bias in the proceeding.¹ Whether a particular matter requires internal separation of prosecutorial and adjudicatory functions is considered on a case-by-case basis.² To ensure compliance with these principles, the FPPC should delegate Executive Director duties related to advising the Commission on Enforcement matters, as well as other duties related to Enforcement personnel and other Enforcement matters typically performed by the Executive Director.

Recommendation

Instead of instituting a case-by-case review, which is the minimum required by law, the Legal Division recommends unqualified delegation of the following duties during the time of overlapping positions:

- **Continued Observance of Ex Parte Communication Prohibitions.** Because the Executive Director will still be acting as Enforcement Chief, she is still prohibited from taking part in ex parte communications to advise or assist the Commission. This essentially represents no change

¹ See generally Government Code section 11430.10, et. seq.; *Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731; and *Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1.

² *Morongo Band of Mission Indians v. State Water Resources Control Bd.* 45 Cal.4th at 738.

in the status quo, as it is ordinarily an attorney from the Legal Division that takes on the permitted role of assistant/advisor to the Commission during enforcement proceedings.

- **Restriction and Re-delegation of Executive Director Authority and Duties in Enforcement Matters.** Regulation 18319 provides, “[e]xcept as otherwise provided, any authority imposed upon the Executive Director by regulations adopted by the Fair Political Practices Commission may be delegated in writing to any member of the Commission staff or any person contracting with the Commission.” Accordingly, the Commission should re-delegate the Executive Director’s authority and powers, in the specific context of enforcement matters, to the General Counsel or another attorney in the Legal Division while the Executive Director acts as Enforcement Chief. Consequently, the Executive Director would not exercise any powers relating to enforcement proceedings during this time period to ensure the APA and due process guarantees.
- **Re-delegation of a Limited Number of Personnel Duties.** A handful of other duties held by the Executive Director, unrelated to enforcement matters, should also be delegated while the Executive Director also serves as Enforcement Chief if they occur during this time. For example, under the FPPC’s Statement of Incompatible Activities, the Executive Director may be presented with appeals from FPPC employees regarding the Division Chief’s interpretation of the Statement of Incompatible Activities. The General Counsel should be responsible for handling appeals from Enforcement Division employees. Similarly, the formal grievance process outlined in State bargaining unit contracts generally involves two levels of review before a grievance is submitted to the Director of CalHR. In those instances, the Executive Director duties should be re-delegated to the Chief of the Administration Division.
- **In Certain Circumstances, Additional Duties Should be Delegated Out of an Abundance of Caution.** In limited circumstances, it is advisable that certain Executive Director duties be re-delegated where the Executive Director’s impartiality may be questioned. For example, under Regulation 18320(d), the Executive Director is responsible for granting or denying opinion requests. If an opinion request relates to or affects a pending enforcement matter, then that duty would be delegated to the General Counsel. Additionally, some duties could potentially require the Executive Director to take action or make determinations that could directly lead to an enforcement action, such as whether to extend a candidate-controlled committee’s time to comply with committee termination requirements (See Regulation 18404.1(e)), which would be delegated to the General Counsel, if a request was received. Further, the Executive Director is broadly permitted, under the FPPC’s Governance Policy, to act on behalf of and in the name of the Commission in between Commission meetings, but should not be permitted to do so with respect to enforcement matters, given the considerations discussed above. Such duties should be re-delegated to the General Counsel.

(See attachment for a comprehensive list of Executive Director duties)

Conclusion

Constitutional due process guarantees, as well as the APA, do not prevent an official from serving as both the Executive Director and Enforcement Chief. However, such constitutional guarantees and statutory requirements must still be observed, which will require caution and effort to ensure internal separation of prosecutorial and advisory or adjudicative functions. While serving a

secondary role as Enforcement Chief, the Executive Director must not exercise any quasi-judicial authority in enforcement matters and related Executive Director duties must be delegated. As a matter of fairness and for the sake of preserving impartiality, additional duties relating to FPPC personnel matters to ensure the official does not perform two levels of review, as well actions and determinations that would directly affect an enforcement matter or potential enforcement matter, as discussed above, should also be delegated. Further, while not necessarily required, various other duties should be delegated to prevent any potential appearance of unfairness or impartiality.

Consequently, during this time, the General Counsel and Administration Division Chief will be required to take on additional duties ordinarily performed by the Executive Director.

Attachment – List of Executive Director Duties



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ATTACHMENT – List of Executive Director Duties

Legal staff has reviewed the Commission’s regulations, policies, and Statement of Incompatible Activities, as well as bargaining unit contracts, and compiled a list of the FPPC Executive Director’s duties. These duties have been categorized as “Duties to Be Delegated to General Counsel/Legal Division,” “Duties to Be Delegated to Chief of Administration,” “Duties to Be Delegated in Limited Circumstances or in an Abundance of Caution,” and “Remaining Duties.”

Duties to Be Delegated to General Counsel/Legal Division

- Acts in the name of the Commission with respect to the following statutory duties:
 - (1) Conducting probable cause hearings
 - (3) Reviewing, approving, and signing subpoenas;
 - (4) Executing oaths and affirmations.
- (“Authority of the Executive Director” Section (c), (1), (3), (4).)
- Considers written requests for reconsideration of sworn complaints and may deny such requests or, based on good cause, direct the Chief of the Enforcement Division to take specified action consistent with the Act and its regulations. (Regulation 18360(d).)
 - If the Executive Director is unavailable, or believes he or she cannot be fair or impartial, the Executive Director may delegate in writing his or her authority under Regulations 18360, 18361.1 through 18361.3, and 18361.5 through 18361.8, to the General Counsel or to an attorney from the Legal Division. The Executive Director may also delegate his or her authority under Regulations 18361.1 and 18361.7, in writing, to an administrative law judge. (Regulation 18361(a) [pertaining to delegation of authority in enforcement proceedings].)
 - The staff, under the direction of the Executive Director, shall seek to assure voluntary compliance with the Political Reform Act and shall investigate possible violations of the Act. The staff shall make reasonable efforts to obtain information on a voluntary basis prior to the issuance of an administrative subpoena. The Executive Director, in the exercise of his or her discretion, may forego this procedure with respect to an investigation in progress. The staff shall periodically report to the members of the Commission on the status of all investigations, including the reasons for the issuance of any administrative subpoena without first making reasonable efforts to obtain the information voluntarily. Failure to report to the Commission concerning the issuance of subpoenas shall not affect the validity of any administrative subpoena. (Regulation 18361.1.)
 - Shall submit a written memorandum to the Commission (first reviewed by General Counsel/Legal Division) after concluding civil litigation should be initiated. (Regulation 18361.2(a).)
 - May be directed to initiate civil litigation, decide whether probable cause proceedings should be commenced pursuant to Regulation 18361.4, return the matter to staff for further investigation, take no further action, or take alternate appropriate action. (Regulation 18361.2(b).)
 - If Executive Director deems it necessary, may call a special meeting of the Commission to review a staff memorandum recommending the initiation of civil litigation. (Regulation 18361.2(d).)

- If the Executive Director or any Commissioner believes that an enforcement decision should not be made until a question of law involving an interpretation of the Political Reform Act is resolved, the Executive Director or any Commissioner may submit the question to the entire Commission. The Commission shall consider the question in general terms at a regular public session. Prior to resolving the question of law, the Commission or the Executive Director may request the staff or any other interested party to submit a legal analysis of the question of law. (Regulation 18361.3.)
- Not later than one week prior to a contested administrative hearing that is to be heard by the Commission itself, shall submit to the Commission a written brief describing the evidence to be presented at the hearing and outlining significant legal arguments expected to be raised. (Regulation 18361.5(a).)
- If the Executive Director determines that a hearing on the merits should be conducted before an administrative law judge alone pursuant to Government Code section 11512(a), he or she shall provide a copy of the accusation as well as a memorandum describing the issues involved to each member of the Commission. (Regulation 18361.5(b).)
- May permit any civil or criminal prosecutor, within the meaning of Government Code sections 91001 and 91001.5, to present a case for determination of probable cause under the procedures of Regulation 18361.4 and to present such a case to the Commission at an administrative hearing if probable cause is found. When the Executive Director authorizes such a presentation, he or she may require that the prosecutor prepare the probable cause report described in subdivision (a) of regulation 18361.4 and present the case at any probable cause conference or administrative hearing that is held. (Regulation 18361.6.)
- May issue a subpoena on behalf of the Commission pursuant to Sections 83118 and 11450.05 et seq. The Executive Director may authorize the issuance of a subpoena duces tecum if he or she finds, based on information submitted to him or her in writing, that the information requested in the subpoena is material to a specific matter under investigation, and the Executive Director reasonably believes the person or entity has the desired information under its control. (Regulation 18361.7)
- Within 14 days of receipt of a proposed decision by an administrative law judge following a hearing held pursuant to Government Code section 83116, the Executive Director shall serve a copy of the proposed decision on the Commission's Enforcement Division and the respondent(s). The Executive Director shall include notification of the date, time and place the matter will be heard by the Commission. (Regulation 18361.9(a).)
- Receives enforcement proceeding briefs. (Regulation 18361.9(b).)
- May grant or deny a petition for reconsideration or extend the time in which to consider the petition. (Regulation 18361.9(c)(5).)
- Based upon specified criteria, may grant or deny a request that all or part of an adjudicated enforcement proceeding decision on the merits be deemed precedent, or not be deemed precedent, or that all or part of a previous related precedent be overruled. (Regulation 18361.10(e)-(f).)
- The Executive Director, or any member of the Commission staff to whom the Executive Director has delegated authority pursuant to 2 Cal. Code Regs. Sections 18319, shall have the authority to administer oaths and affirmations on behalf of the Commission pursuant to Government Code Section 83118. (Regulation 18363.)

- May be presented with questions from Division Chiefs regarding interpretation of Statement of Incompatible Activities. (Statement of Incompatible Activities, Section (e).)
- May be presented with appeals from FPPC employees regarding Division Chiefs' interpretation of the Statement of Incompatible Activities. (Statement of Incompatible Activities, Section (e)(1).)

Duties to Be Delegated to Chief of Administration

- May be designated as someone who reviews formal grievances at one stage of the formal grievance process established in state bargaining unit MOUs.

Duties to Be Delegated in Limited Circumstances or in an Abundance of Caution

- Subject to the limitations of Commission established policy and under the day-to-day direction of the Chair, may act on behalf of and in the name of the Commission between meetings of the Commission, including certifying actions taken by the Commission. May not establish or revise policies, promulgate or amend rules or regulations, issue or revise Commission opinions, or approve or revise positions on legislation pursuant to this subdivision. ("Authority of the Executive Director" Section (a)(6).)
- Determines whether to grant or deny opinion requests. (Regulation 18320(d).)
- May petition the Commission to grant a rehearing after the adoption or rejection of a formal opinion by the Commission. (Regulation 18326(a).)
- May extend, upon request and for good cause, a candidate controlled committee's time to comply with the committee termination requirements of Regulation 18404.1. (Regulation 18404.1(e).)
- May reopen a terminated committee under specified circumstances. (Regulation 18404.1(g).)
- Must reinstate a terminated committee if the committee files a written request for reinstatement with the Commission, files any delinquent statements required by the Enforcement Division, and pays any outstanding fees or fines. (Regulation 18404.2(d).)
- May, for good cause and consistent with the purposes of Sections 85304 and 85304.5 and Regulations 18530.4 and 18530.45, extend the termination date or permit candidates or officers to reopen a legal defense account. (Regulations 18530.4(i) and 18530.45(k).)
- May, for good cause, extend the termination date or permit a candidate to reopen an officeholder account. (Regulation 18531.62(g)(5).)

Remaining Duties

- Re-delegates Commission policies and strategic objectives to FPPC employees. ("Authority of the Commission" Section (b)(1).)
- Provides periodic reports to the Commission concerning the status of the FPPC's budget, financial control and reporting system, and the Commission's compliance with all laws governing the Agency. ("Authority of the Commission" Section (b)(7).)

- Receives requests from the Commission for information from staff, and ensures that all Commissioners receive the benefit of information and non-confidential advice provided to any individual Commissioner. (“Authority of the Commission” Section (c)(3).)
- Has primary responsibility for the operations and management of the Agency under the day-to-day supervision of the Chair in conformance with Commission policy. (“Authority of the Executive Director,” introduction)
- Ensures that the Chair and Commissioners are fully informed regarding the operations and management of the Agency. (“Authority of the Executive Director,” introduction)
- Acts as the chief of staff of the FPPC. (“Authority of the Executive Director” Section (a).)
- Selects, regularly evaluates, and when necessary, disciplines or dismisses executive staff in accordance with Commission policies and procedures. (“Authority of the Executive Director” Section (a)(1).)
- With input from the Division Chiefs, hires, evaluates, promotes, and when necessary, disciplines or dismisses other staff in accordance with Commission policies and procedures. (“Authority of the Executive Director” Section (a)(2).)
- Regularly reports to Budget and Staffing Committee and the Commission on activities in connection with the hiring, evaluation, promotion, discipline, and dismissal of executive staff and other staff. (“Authority of the Executive Director” Section (a)(3).)
- In consultation with the Budget and Staffing Committee, prepares and submits to the Commission all office policies and procedures applicable to staff not in conflict with any statute, regulation, or applicable state employee collective bargaining contract. (“Authority of the Executive Director” Section (a)(4).)
- Receives and coordinates requests from commissioners regarding staff work and, in consultation with the Chair and Division Chiefs, prioritizes such requests consistent with Commission policies and goals. (“Authority of the Executive Director” Section (a)(5).)
- Reports in writing each month to the Commission on actions taken on behalf of the Commission for its review and approval. (“Authority of the Executive Director” Section (a)(7).)
- Pursuant to Commission established policy and under the day-to-day oversight of the Chair, ensures that the information provided to the Commission is comprehensive, timely, impartial and not unduly burdensome. (“Authority of the Executive Director” Section (a)(8).)
- Under the day-to-day oversight of the Chair, and subject to established Commission policy, oversees the implementation of the short-term and long-term goals and priorities of the Commission and reports to the Commission in writing on achievement of its goals and priorities. (“Authority of the Executive Director” Section (a)(9).)
- Pursuant to Commission established policy and under the day-to-day oversight of the Chair, exercises oversight over Commission staff with respect to their official duties to communicate with the public, the press, and government institutions to ensure that those communications are forthright, accurate, and do not disparage any Commissioner or staff member. (“Authority of the Executive Director” Section (a)(10).)
- Acts as the chief budgetary and administrative officer of the Agency. (“Authority of the Executive Director” Section (b).)
- In consultation with the Chair, Chief of Administration, Division Heads, and the Budget and Staffing Committee, prepares and submits an annual budget proposal, and any budget change proposals, to

the Commission, in accordance with Commission policies and procedures. (“Authority of the Executive Director” Section (b)(1).)

- In consultation with the Budget and Staffing Committee, reports monthly in writing to the Commission on the status of Commission finances and administrative actions. (“Authority of the Executive Director” Section (b)(2).)
- In consultation with the Budget and Staffing Committee, prepares and submits budget change proposals, requests for deficit funding and other budgetary documents to the Department of Finance. (“Authority of the Executive Director” Section (b)(3).)
- In consultation with the Budget and Staffing Committee, approves all fiscal analyses prepared at the request of the Legislature, Legislative Analyst or Department of Finance. (“Authority of the Executive Director” Section (b)(4).)
- Retains final approval for all budgeted expenditures. (“Authority of the Executive Director” Section (b)(5).)
- In accordance with Commission approved guidelines, authorizes unbudgeted expenditures, when deemed appropriate, up to \$25,000. (“Authority of the Executive Director” Section (b)(6).)
- Reviews and approves contracts in accordance with Commission policies and procedures. (“Authority of the Executive Director” Section (b)(7).)
- Reviews and approves Commissioner compensation and reimbursement requests in accordance with the policy on compensation and reimbursement of Commissioners. (“Authority of the Executive Director” Section (b)(8).)
- Acts in the name of the Commission with respect to the following statutory duties:

(2) Reviewing and approving conflict of interest codes other than the code of the Commission. (“Authority of the Executive Director” Section (c)(2).)

- In consultation with the Chief of Administration and Budget and Staffing Committee, shall prepare a draft annual budget for the Commission’s review and approval. (“Budget Adoption and Budget Change Process” Section (a).)
- Prior to the preparation of the draft annual budget, shall solicit input from Commissioners concerning potential budget-related matters or proposals for the purpose of considering the same during the budget preparation process. (“Budget Adoption and Budget Change Process” Section (b).)
- In consultation with the Chief of Administration and the Budget and Staffing Committee, shall prepare and submit to the Commission recommendations at each stage of the budget process, including prior to the Commission’s proposal to the Department of Finance (DOF), the DOF proposal to the Governor, and the Governor’s proposed annual budget to the Legislature. (“Budget Adoption and Budget Change Process” Section (e).)
- Receives disclosures from Commissioners regarding ex parte communications in matters not concerning pending Enforcement cases subject to APA ex parte communication rules. (Non-Enforcement Ex Parte Communications Policy.)
- May confer with Commissioners regarding potential honoraria/travel payments from outside groups for Commission-related expenses. (Honoraria and Travel Policy.)
- Reviews and approves Commission travel expense payments to be received by FPPC employees from anyone other than a local, state, or federal agency. (Statement of Incompatible Activities, Section (d)(1)(A).)

- Reviews and approves FPPC officers' receipt of Commission travel expense payments. (Statement of Incompatible Activities, Section (d)(1)(B).)
- Reviews and provides written approval prior to FPPC employees taking outside employment or attempting to influence legislative or administration action on behalf of any other person. (Statement of Incompatible Activities, Section (d)(3)(F).)
- Receives notification from Division Chiefs in any circumstance where the Division Chief's impartiality may be questioned with regard to a particular matter. (Statement of Incompatible Activities, Section (d)(5).)
- Notifies the Chair in any circumstance where the Executive Director's impartiality may be questioned with regard to a particular matter. (Statement of Incompatible Activities, Section (d)(5).)
- May delegate authority to FPPC staff members. (Regulation 18319.)
- Receives and responds in writing to state agencies requesting consultation on proposed ethics orientation course materials. (Regulation 18370(c)(2).)
- The list of a committee's top 10 contributors must disclose the information required by Section 84223(b) on a form prescribed by the Commission, or in a substantially similar format or spreadsheet approved by the Executive Director. (Regulation 18422.5(a)(2).)
- A designated employee who transfers to the position of board member, commissioner, head of an agency, executive director, or other chief executive officer within the same agency and designated in the agency's conflict-of-interest code shall:
 - (1) Within 10 days of the transfer, file with the person or agency specified in Section 87500, for the position to which the employee is transferring, an amendment to his or her most recent Statement of Economic Interests providing the following information:
 - (A) The employee's new position or office.
 - (B) The date of the transfer.
 - (C) Investments, business positions, and interests in real property held on the date of the transfer, and income received during the 12 months before the date of the transfer, which must be disclosed under the employee's new disclosure category and were not reported on the employee's last Statement of Economic Interests.
 - (2) Disclose interests on his or her next Statement of Economic Interests held or received since the employee's last statement as required by subdivisions (a)(1) and (a)(2).
 - (Regulation 18735(b).)
- May, for good cause, extend the time periods established in Regulation 18740 (involving compliance with or appeal of a determination regarding legally prohibited disclosures in SEIs). (Regulation 18740(d).)
- Has authority to review and approve, in accordance with Section 87311, a proposed [state or multi-county agency conflict of interest] code or code amendment as required by Section 87303. (Regulation 18750(c)(3).)
- Has authority to grant an exemption or extension for the adoption of a state agency or multi-county agency conflict of interest code on his or her own initiative or in response to a request by the agency, subject to specified criteria. (Regulation 18751(d).)