BEFORE THE
FAIR POLITICAL PRACTICES COMMISSION
STATE OF CALIFORNIA

In the Matter of the Accusation Against: LARRY R. DANIELSEN, Respondent.	FPPC No. 00/273 OAH No. N2002030135

PROPOSED DECISION

Administrative Law Judge Catherine B. Frink, State of California, Office of Administrative Hearings, heard this matter in Sacramento, California on June 10, 2002 and July 30-31, 2002.

Steven Meinrath, Commission Counsel, represented the Fair Political Practices Commission ("FPPC").

Respondent was present and represented himself, with the assistance of Dan Tankersley.

Evidence was received, the hearing was closed, and the record was held open for the submission of briefs. FPPC's Closing Brief was received on August 9, 2002 and was marked as Exhibit Y. Respondent's Closing Arguments were received on September 6, 2002 and were marked as Exhibit 381. FPPC's Closing Reply Brief was received on September 10, 2002 and was marked as Exhibit Z. Thereupon, the record was closed and the matter was submitted on September 10, 2002.

FACTUAL FINDINGS

1. Official notice is taken that complainant Mark Krausse, Acting Executive Director, FPPC, filed the Accusation in his official capacity.

2. Larry R. Danielsen ("respondent") has been employed as a Civil Engineering Associate ("CEA") for the California Department of Boating and Waterways ("DBAW") since May 13, 1998.

3. Government Code section 87300 et seq. requires every state and local government agency to adopt a Conflict of Interest Code ("CIC"). Government Code section 87302 sets forth the required contents of an agency's CIC. Government Code section 87302 states in pertinent part as follows:

> "Each Conflict of Interest Code shall contain the following provisions:
>
> "(a) Specific enumeration of the positions within the agency, other than those specified in Section 87200, which involve the making or participation in the making of decisions which may foreseeably have a material effect on any financial interest ...
>
> "(b) Requirements that each designated employee, other than those specified in Section 87200, file statements at times and under circumstances described in this section, disclosing reportable investments, business positions, interests in real property and income....
>
> "..."

4. Title 2, California Code of Regulations ("2 CCR") section 18730 contains a "model" CIC and authorizes agencies to adopt a regulation that incorporate the terms of 2 CCR section 18730 by reference, together with the designation of employees and the formulation of disclosure categories in an Appendix. The regulation so adopted becomes the agency's CIC. DBAW adopted its CIC using the above method in February of 1981. DBAW's CIC is set forth at Title 14, CCR section 8600. The Appendix to 14 CCR section 8600 lists the following designated employees: "Department Director; Deputy Director; Special Assistants to the Director; Division Chiefs; Program Managers; Project Managers; Consultants; and Members of the Boating and Waterways Commission."

5. 2 CCR section 18730(b)(5), incorporated by reference into DBAW's CIC, states as follows:

> "(5) Section 5. Statements of Economic Interests: Time of Filing.
>
> "(A) Initial Statements. All designated employees employed by the agency on the effective date of this code, as originally adopted, promulgated and approved by the code reviewing body, shall file statements within 30 days after the effective date of this code. Thereafter, each person already in a position when it is designated by an amendment to this code shall file an initial statement within 30 days after the effective date of the amendment.
>
> "(B) Assuming Office Statements. All persons assuming designated positions after the effective date of this code shall file statements within 30 days after assuming the designated positions, or if subject to State Senate confirmation,

30 days after being nominated or appointed.

"(C) Annual Statements. All designated employees shall file statements no later than April 1.

"(D) Leaving Office Statements. All persons who leave designated positions shall file statements within 30 days after leaving office."

6. Government Code section 87303 states in part that, "[N]o conflict of interest code shall be effective until it has been approved by the code reviewing body." Pursuant to Government Code section 82011(a), FPPC is the code reviewing body with respect to the conflict-of-interest code of a state agency other than an agency in the judicial branch of government. The procedures for the promulgation and adoption and/or amendment of conflict of interest codes for state agencies is set forth in 2 CCR section 18750. 2 CCR section 18750(e)(1)(G) requires the agency that proposes to adopt or amend a CIC to provide FPPC with copies of job descriptions for all designated employees or employees newly designated by any amendment. FPPC approved DBAW's CIC on December 1, 1980. According to Wayne Imberi, Political Reform Consultant with FPPC, agencies are not required to provide FPPC with revised job duty statements for designated employee positions unless the agency intends to amend its CIC.

7. The designated employees in DBAW's CIC are listed by working titles, rather than by civil service classifications. It has been the established practice of FPPC to accept working titles, based on job duties, as well as civil service classification titles, in the enumeration of positions within an agency for purposes of compliance with Government Code section 87302(a).

8. The job duty statement for respondent's position, CEA (Local Assistance), promulgated prior to respondent's employment with DBAW, states as follows:

"This position is supervised by a Senior Civil Engineer and in summary involves the following work duties at the approximate time percentages shown:

"50% PROJECT MANAGEMENT AND ADMINISTRATION WORK
Review and approval of progress payments
Review and approval of construction change orders
Attend meetings with local government representatives
Coordination work with consultants and contractors
Construction inspection and observation

"20% REVIEW PLANS AND SPECIFICATONS PREPARED BY OTHERS
Review plans and specifications for project scope compliance
Review plans and specifications for conformance with department guidelines and policies

"15% PREPARATION OF PLANS AND SPECIFICATIONS
Conduct site topographic surveys
Design boating facility projects
Prepare project specifications
Supervise drafting of the project plans

"10% PREPARE PROJECT STUDY AND FEASIBILITY REPORTS
Prepare project feasibility reports for DBW Commission review

"5% OTHER DUTIES AS REQUIRED"

9. As a consequence of the job duties performed by CEAs at DBAW, CEAs have been considered "project managers" and have used the working title, "Project Manager" in the course of their employment. Respondent had personal knowledge of the fact that "Project Manager" was a working title for the position of CEA, in that he signed correspondence "Larry R. Danielsen, Project Manager" from September 1998 through at least December 8, 2000.

10. As project managers, CEAs have been deemed designated employees for purposes of DBAW's CIC and have been required to file Statements of Economic Interests ("SEIs") pursuant to 2 CCR section 18730(b)(5).

11. As a CEA employed by DBAW, respondent's actual job duties involve the making or participation in the making of decisions which may foreseeably have a material effect on financial interests. Respondent served as a project manager both in his work on the Local Assistance Program and the Capital Outlay Program. In both programs, respondent is responsible for overseeing the disbursement of funds. Respondent approves invoices so contractors can be paid. Respondent determines the level of completion of the projects and the adequacy of contractor performance before approving progress payments or final payments. While respondent's recommendations require the concurrence of his immediate supervisor and ultimate action by DBAW management, respondent exercises independent judgment and discretion in evaluating contractor compliance, without significant intervening substantive review. As part of his Capital Outlay Program responsibilities, respondent negotiates contract change orders directly with the contracting entity when unforeseen circumstances arise; these changes are initialed by his immediate supervisor and authorized by the DBAW director or his/her designee, again without significant substantive review. At least 50 percent of respondent's job duties involve preparing plans and specifications that could incorporate design features that might favor certain vendors; depending on the design and materials respondent specifies to be used, respondent can directly influence whether certain contractors will be qualified or eligible to bid on the project. Respondent has participated in negotiations to help bring projects in for budgeted amounts and has sat in on negotiations with grant recipients. Respondent also evaluates bids and makes recommendations to the decisionmaker as to which bid should be accepted. Respondent's duties as set forth above are not solely ministerial, secretarial, manual, or clerical.

12. Respondent and other CEAs met with their then-immediate supervisor, Senior Civil Engineer Steve Watanabe, in March or April of 2000 regarding their status as project managers. The CEAs contended that their project manager duties at DBAW were equivalent to Project Director duties, a civil service classification for certain employees at the Department of General Services ("DGS"), for which those employees receive a higher salary. Mr. Watanabe told respondent that he was not a project manager in terms of comparing himself to the Project Director job classification as used by DGS. Respondent was told that CEAs were project managers within DBAW because the projects to which they were assigned were theirs to implement, but in terms of the DGS classification, the "Project Director" was the person on the grant-receiving end. Beginning in late 2000 or early 2001, respondent ceased referring to himself as "project manager" in memoranda and outside correspondence. The job duties of CEAs at DBAW did not change as a result of the conversation between Mr. Watanabe and the CEAs in 2000.

13. Kathy Emery is the "filing officer" for DBAW in matters concerning DBAW's CIC. The duties of an agency's filing officer include notifying employees of their obligations to file SEIs as designated employees under the agency's CIC. When respondent first became employed by DBAW, Ms. Emery did not inform him that he was required to file an assuming office SEI pursuant to section 5(B) of DBAW's CIC (2 CCR section 18730(b)(5)(B)) within 30 days after assuming the designated position of "project manager." Respondent was not informed of his duty to file an assuming office SEI by anyone at DBAW, and he did not learn of this obligation until FPPC investigator Bill Motmans wrote respondent a letter dated February 15, 2001, notifying him that his assuming office SEI was delinquent.

14. As a designated employee of DBAW, respondent was required by DBAW's CIC to file an assuming office SEI disclosing his reportable economic interests during the 12 months preceding his date of hire (i.e., May 13, 1997 through May 13, 1998). Respondent has not filed an assuming office SEI with DBAW and/or FPPC, despite being notified of his obligation to do so on February 15, 2001.

15. As a designated employee of DBAW, respondent was required by DBAW's CIC to file an annual SEI by April 1, 1999, disclosing his reportable economic interests from May 14, 1998 through December 31, 1998.

16. On or about March 1, 1999, DBAW Administrative Officer Debra DeVerter sent a memorandum to all designated employees (erroneously dated March 1, 1998) entitled, "ANNUAL FILING NOTIFICATION—STATEMENT OF ECONOMIC INTERESTS." The memorandum informed employees that the period covered by the annual SEI was January 1, 1998 to December 31, 1998, and that the completed Form 700 was to be filed with her office no later than April 1, 1999.

17. Respondent did not file an annual SEI by April 1, 1999. In April of 1999, respondent sent a memorandum to Ms. Emery questioning his duty to file as SEI, based on

his belief that his position was not included in DBAW's CIC. In response, Ms. Emery asked Joy Fisher, Staff Counsel III, to research the question. In a memorandum dated June 2, 1999, Ms. Fisher advised Ms. Emery that respondent was obligated to file an SEI because the DBAW's CIC listed employees by "working titles" rather than by civil service classifications, and that the duty statement for CEA (Local Assistance) listed "project management and administration work" as 50% of the duties of the position. Thus, respondent was deemed a "Project Manager," one of the designated positions listed in DBAW's CIC.

18. On August 4, 1999, Ms. Emery sent a memorandum to respondent reminding him of his duty to file an SEI and attaching a copy of the memorandum of law from Ms. Fisher. Ms. Emery's memorandum stated in part as follows:

> "I hope this answers your questions on this issue. Attached is a blank Form 700 for you to complete and return to me by August 20, 1999. However, if you still do not agree with the filing requirement for your position, this matter will be referred to the Fair Political Practices Commission."

19. On August 17, 1999, respondent sent a memorandum to Ms. Emery in which he asserted that civil service employees were not public officials within the meaning of Government Code section 8100 et seq., and he invoked his "unalienable [sic] right against self-incrimination as secured by the IV and V Amendments and applied to the States via the 14th Amendment." In response, on November 5, 1999, Ms. Emery wrote a letter to Dixie Howard, an employee of FPPC in the Technical Assistance Division, requesting responses to respondent's questions concerning the filing requirement for his position as a CEA. Ms. Emery further asked Ms. Howard to "review the filing requirements for all Civil Engineer positions within our department." The concluding paragraph of the letter stated in pertinent part as follows:

> "Our department is also in the process of revising our Conflict of Interest Code.... I will await your determination in this matter before I respond to the employee's August 17, 1999 memo...."

20. Ms. Emery never received a written response to her November 5, 1999 letter from FPPC. She believes she discussed the matter with Ms. Howard over the telephone, and that Ms. Howard told her the Civil Engineering Associates should comply with the filing requirement. Ms. Emery did not communicate the results of her inquiry to respondent.

21. As a designated employee of DBAW, respondent was required by DBAW's CIC to file an annual SEI by April 3, 2000, disclosing his reportable economic interests in 1999.

22. On February 28, 2000, Ms. DeVerter sent a memorandum to all designated employees entitled, "ANNUAL FILING NOTIFICATION—STATEMENT OF ECONOMIC INTERESTS." The memorandum informed employees that the period covered

by the annual SEI was January 1, 1999 to December 31, 1999, and that the completed Form 700 was to be filed with her office no later than April 3, 2000. The memorandum further stated that a penalty of $10 per day, up to a maximum of $100, could be imposed for late filers, and that "any person who is referred to the [FPPC's] Enforcement Division for not filing is subject to a minimum fine of $200-$300."

23. On March 27, 2000, Ms. Emery sent a reminder e-mail to respondent stating that she had not received his Form 700 and reiterating that the filing deadline was April 3, 2000.

24. On April 3, 2000, Ms. Emery sent another reminder e-mail to respondent regarding his duty to file an annual SEI for 1999.

25. Respondent did not file a 1999 annual SEI by April 3, 2000.

26. On April 4, 2000, respondent sent an e-mail to Ms. Emery, in which he stated that, "the Statement of Economic Interest Form you are requesting to have filled out violates my first amendment rights as applied to the states via the 14th amendment, etc.... Therefore, there is no requirement for me to fill out such Form."

27. By memorandum dated May 15, 2000, Ms. Emery referred the matter of respondent's failure to file annual SEIs for 1998 and 1999 to FPPC's Enforcement Division for resolution.

28. By letter dated February 15, 2001, FPPC Investigator Bill Motmans advised respondent that, as an employee of DBAW whose position is designated under that agency's CIC, he was required to file a Form 700; that he had not filed any of the required SEIs since his appointment on May 13, 1998; that the matter had been referred to FPPC's Enforcement Division; and that the failure to file required SEIs could be prosecuted as a violation of the Political Reform Act, with fines up to $2000 per offense. Mr. Motmans again requested that respondent file all of his delinquent SEIs, namely, the assuming office statement covering May 13, 1997 through May 13, 1998; an annual statement covering May 14, 1998 through December 31, 1998; and an annual statement covering January 1, 1999 through December 31, 1999. The letter requested that respondent file the requested documents with FPPC by February 23, 2001; respondent was also given the opportunity to "submit an explanation as to why they were not timely filed, or any factors you would like the FPPC to consider in mitigation."

29. On February 20, 2001, respondent submitted a document to FPPC that addressed the following subjects: Notice of Defense, Request for an Administrative Hearing, Request for Production of Documents and Request for Administrative Interrogatories. Respondent denied and objected "to any and all alleged accusations" contained in the February 15, 2001 letter, and requested a hearing.

30. As a designated employee of DBAW, respondent was required by DBAW's CIC to file an annual SEI by April 2, 2001, disclosing his reportable economic interests in 2000.

31. On March 6, 2001, Ms. DeVerter sent a memorandum to all designated employees entitled, "ANNUAL FILING NOTIFICATION—STATEMENT OF ECONOMIC INTERESTS." The memorandum informed employees that the period covered by the annual SEI was January 1, 2000 to December 31, 2000, and that the completed Form 700 was to be filed with her office no later than April 2, 2001. The memorandum further stated that a penalty of $10 per day, up to a maximum of $100, could be imposed for late filers, and that "any person who is referred to the [FPPC's] Enforcement Division for not filing is subject to a minimum fine of $200-$300."

32. FPPC Staff Counsel Steven Meinrath sent respondent a letter dated March 9, 2001 stating that a Probable Cause Conference, FPPC Case No. 00/273, had been scheduled for April 9, 2001 in response to respondent's February 20, 2001 hearing request. Enclosed with the March 9, 2001 letter was a Report in Support of a Finding of Probable Cause. Mr. Meinrath's March 9, 2001 letter noted that "[respondent's] year 2000 SEI is due April 1, 2001, and failure to file the required SEI by that date may result in a penalty of up to $5,000. If you fail to file the year 2000 SEI, I will amend the attached Report in Support of a Finding of Probable Cause to add that count as well."

33. By letter dated March 19, 2001, respondent requested a continuance of the April 9, 2001 Probable Cause Conference. In a letter to respondent dated March 21, 2001, Mr. Meinrath agreed to a continuance of the Probable Cause Conference at respondent's request to June 4, 2001, the date requested by respondent. The March 21, 2001 letter again reminded respondent of his duty to file his 2000 annual SEI by April 1, 2001, and warning that failure to do so would constitute an additional violation of the law, subject to a $5,000 civil penalty.

34. On April 2, 2001, Ms. Emery sent an e-mail message to respondent reminding him of his obligation to file an annual SEI on that date.

35. Respondent did not file a 2000 annual SEI by April 2, 2001.

36. On April 3, 2001, respondent sent an e-mail to Ms. Emery, stating in pertinent part as follows:

> "Kathy, the alleged requirement that a Sanitary Engineering associate [sic] is required to file a Form 700 is under administrative review at FPPC in the case of Danielsen v. FPPC No 00/273. It is premature at this time for me to send the Department a Form 700 until all administrative and court remedies are exhausted."

37. Ms. Emery sent an e-mail to respondent on April 3, 2001 that stated, "As a Civil Engineering Associate, you are required by DBW's Conflict of Interest Code to complete an Annual Form 700. I suggest you take this up with the FPPC if you disagree."

38. By letter dated April 24, 2001, Ms. Emery referred the matter of respondent's failure to file his annual SEI for 2000 to FPPC's Enforcement Division for resolution. By letter dated April 25, 2001, FPPC notified respondent that an Amended Report in Support of Probable Cause had been prepared alleging an additional violation of the Political Reform Act based upon respondent's failure to file his annual SEI for 2000.

39. A Probable Cause Conference was held on June 4, 2001 before Luisa Menchaca, General Counsel. Respondent was represented at the Probable Cause Conference by Rosa Reyes, Labor Relations Representative, California State Employees Association. Ms. Menchaca issued an Order Re: Probable Cause on June 29, 2001, in which she found probable cause existed that respondent had committed violations of the Political Reform Act. The Order Re: Probable Cause stated in part as follows:

> "Despite his agency's determination that Respondent is a designated employee, Respondent claims that he has no filing obligations because his position is not enumerated in the code. Respondent also argues, in the alternative, that he is not properly designated in the code because his governmental duties do not give rise to a reporting obligation under the Political Reform Act. Respondent has not followed any appropriate procedure allowed under the Political Reform Act to appeal his agency's determination or to seek an amendment of Respondent's [sic] conflict of interest code to re-examine whether Respondent is properly designated in the state agency's conflict of interest code. (See Section 87307 and 2 Cal. Code Regs. Sections 18737 and 18750.) Respondent has, instead, simply chosen for years not to comply with the filing requirements imposed upon him by Government Code sections 87300 and 87302, as implemented by his employer."

Prior to the statements set forth above in the Order Re: Probable Cause, neither DBAW nor FPPC notified respondent that any alternate procedure existed to challenge his status as a designated employee under DBAW's CIC.

40. Respondent was served with the Accusation herein on or about July 31, 2001.

41. On October 30, 2001, respondent served four documents on the FPPC by mail. The documents were entitled, "TITLE 14---BOATING AND WATERWAYS, CONFLICT OF INTEREST—CATEGORY 2 FILING". There were separate forms for the periods May 13, 1998 through December 31, 1998; January 1, 1999 through December 31, 1999; January 1, 2000 through December 31, 2000; and January 1, 2001 through December 31, 2001. The documents were not forms promulgated by FPPC or provided by DBAW. The documents stated in pertinent part as follows:

"This disclosure form complies with Title 14—Boating and Waterways, Chapter 3, CONFLICT OF INTEREST CODE, SECTION 8600 and APPENDIX, DISCLOSURE CATEGORY 2.

"I. Larry R. Danielsen, a civil service employee with the STATE OF CALIFORNIA, DEPARTMENT OF BOATING AND WATERWAYS hereby declare that I am the individual making this CONFLICT OF INTEREST disclosure in conformance with Title 14—Boating and Waterways, Chapter 3, CONFLICT OF INTEREST CODE, SECTION 8600 and APPENDIX, DISCLOSURE CATEGORY 2. For the period from [date] to [date], I did not have any known investment, interests in real property, income or status as director, officer, partner, trustee, employee or holder of any position of management in a business entity, source of income or real property in disclosure categories 2.(a), 2.(b), 2.(c), 2.(d) and 2.(e).

"[signature] Larry R. Danielsen

"We, the undersigned hereby affix our signatures in affirmation that the above signed person did identify himself, by State identification, as Larry R. Danielsen, and did date and affix his signature to this CONFLICT OF INTEREST DISCLOSURE on this 30 day of October, 2001. We declare this to be true, correct, and complete to the best of our knowledge."

Respondent signed the documents, as did three witnesses.

42. On March 26, 2002, respondent served FPPC with a Statement of Economic Interests, Form 700, for the period from May 13, 1998 through December 31, 2001. Respondent altered Part 5. Verification, on the form, to read as follows:

"I have used all reasonable diligence in preparing this statement. I have reviewed this statement and to the best of my knowledge the information contained herein and any attached schedules is true and complete. I declare that the foregoing is true and correct."

Respondent signed the form and dated it on March 22, 2002. Respondent included an attachment to the altered Form 700, which he also signed and dated on March 22, 2002, as did three witnesses. The document stated as follows:

"ATTACHMENT TO STATEMENT OF ECONOMIC INTERESTS

"This first amendment attachment to statement of economic interests complies with religious beliefs and attached to FPPC Form 700 cover page. This statement is attached because the requested verification on Form 700 under penalty of perjury to the State of California represents an oath to the Kal Niranjan or it's [sic] agents (negative power/idols). I believe the requested

verification to the State of California God violates religious practices to serve no other master than the resurrected Spirit of God. However, in good faith settlement with FPPC request of February 15, 2002 to use their form, I filled out said Form 700 and I declare before three witnesses by this attachment to the form that I have used all reasonable diligence in preparing this statement. I have reviewed this statement and to the best of my knowledge the information contained herein and any attached schedules is true and complete. I declare that the foregoing is true and correct. There is no fine for the exercise of one's first amendment rights and religious beliefs. I declare the foregoing is true and correct.

"Date Signed: 3/22/2002

"Signature: [Larry A. Danielsen]

"We, the undersigned hereby affix our signatures in affirmation that the above signed person did identify himself, by State identification, as Larry R. Danielsen, and did date and affix his signature to this statement on 3/22/2002. We declare this to be true, correct, and complete to the best of our knowledge."

43. By letter dated March 29, 2002, FPPC acknowledged receipt of respondent's Form 700. The letter stated in pertinent part as follows:

"Because you altered the Form 700 to remove the language indicating that the form was being signed under penalty of perjury, this is not a 'form prescribed by the Fair Political Practices Commission' and therefore does not comply with your filing requirement. Title 2, California Code of Regulations, section 18730, subdivision (b) (7) states that 'statements of economic interest shall be made on forms prescribed by the Fair Political Practices Commission and supplied by the agency...'"

44. Respondent did not testify at the administrative hearing. In an attempt to provide respondent with an alternative to the oath, affirmation or declaration required by Code of Civil Procedure section 2094(a), the administrative law judge read a statement to respondent which stated in pertinent part as follows:

"Do you understand that you have a legal obligation to tell the truth in this proceeding? Do you further understand that if you willfully state as true any material matter which you know to be false, you could be prosecuted for the crime of perjury under California law?"

Respondent was unwilling to answer "yes" to the second question, namely, that he understood that he could be prosecuted for perjury if he willfully stated as true any material matter which he knew to be false.

45. DBAW is in the process of amending its CIC. DBAW submitted its Notice of Intention to Amend the Conflict of Interest Code of the Department of Boating and Waterways, together with the proposed amendments and Initial Statement of Reasons to Amend the Conflict of Interest Regulation of the Department of Boating and Waterways ("Statement of Reasons") in early 2002. A 45-day written comment period was established commencing on February 15, 2002 and closing on April 1, 2002. The Statement of Reasons states in pertinent part as follows:

> "The existing Appendix to Section 8600 contains a list of Department employees who are required to file a Statement of Economic Interests.
>
> "For purposes of reporting a Statement of Economic Interests, the Department of Boating and Waterways is adding the following positions: (1) a Staff Counsel in the Executive Office; (2) an Associate Governmental Program Analyst in the Legislation, Public Information and Regulations Unit; (3) a Staff Services Analyst in the Boating Facilities Division; (4) an Environmental Specialist in the Boating Facilities Division; (5) an Associate Information Systems Analyst (Specialist) to the Administrative Services Division; and (6) an Associate Information Systems Analyst in the Administrative Services Division. All other classifications amended by this regulation are currently required to report under general classifications such as 'project managers' or 'program managers.'
>
> "These six new positions are added to the list of employees who are required to file a Statement of Economic Interests because the positions involve making or participating in the making of decisions that may foreseeably have a material financial effect on any financial interest in the Department. This portion of the proposed rulemaking is a substantive change to the Department's conflict of interest regulation, in accordance with the provisions of Section 87306 of the Government Code.
>
> "The Appendix to Section 8600 that identifies employees required to file a Statement of Economic Interests uses generic or working title position classifications. The Appendix does not identify employees by civil service classification title and the respective divisions in which they are assigned. For purposes of clarity, the Department of Boating and Waterways has made non-substantive amendments to the existing Appendix of designated employees who must file a Statement of Economic Interests. The changes amend the previous generic or working title position classifications and non-division specific designation to show each position to be civil service classification specific and division specific. The proposed Appendix amendments reflect the current classification specific position and their corresponding divisional assignments with the Department for purposes of clarity and specification. These changes therefore are considered to be non-substantive."

The proposed amendment to the Appendix to DBAW's CIC includes the job classification of "Civil Engineering Associate" within the Boating Facilities Division. The proposed amendment also retains the generic working job title of "Project Managers" within the Boating Facilities Division.

46. David Johnson, an employee of DBAW responsible for managing legislation, public information and regulations, testified that an FPPC employee recommended that the DBAW CIC be amended to enumerate positions with more specificity, rather than by general working job titles. Mr. Johnson was not notified that DBAW's current designation of employees in the Appendix to its CIC was invalid or improper.

LEGAL CONCLUSIONS

Hearing Procedure and Standard of Proof

1. Government Code section 83116 states in pertinent part as follows:

§ 83116. Violations; Hearings; Cease and desist orders

"When the 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. ..."

Prior to January 1, 2001, the maximum monetary penalty per violation was $2,000.

2. 2 CCR section 18362(e)(3) states in pertinent part as follows:

§ 18361. Enforcement Proceedings

"(3) Standard of Proof. When an administrative hearing is conducted under

Government Code Section 83116, findings shall be made on a preponderance of the evidence ..."

Respondent's Duty to File Statements of Economic Interests

3. Government Code section 82019(c) states as follows:

§ 82019. Designated Employee

"'Designated employee' means an officer, employee, member, or consultant of any agency whose position with the agency:

"(c) Is designated in a Conflict of Interest Code because the position entails the making or participation in the making of decisions which may foreseeably have a material effect on any financial interest;"

4. 2 CCR section 18702 states as follows:

§ 18702. Making, Participating in Making, or Using or Attempting to Use Official Position to Influence a Government Decision, Defined

"To determine if a public official is making, participating in making, or using or attempting to use his/her official position to influence a government decision, apply Title 2, California Code of Regulations, sections 18702.1 through 18702.4, respectively."

5. 2 CCR section 18702.2 states as follows:

§ 18702.2. Determining When a Public Official is Participating in Making a Governmental Decision

"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);

"(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)."

6. 2 CCR section 18701(a)(2)(A) states in pertinent part as follows:

§ 18701. Public Official, Definitions

"(A) Makes a governmental decision whether to:

"...

"4. Authorize the agency to enter into, modify, or renew a contract provided it is the type of contract that requires agency approval;

"5. Grant agency approval to a contract that requires agency approval and to which the agency is a party, or to the specifications for such a contract;

"6. Grant agency approval to a plan, design, report, study, or similar item;

"..."

7. 2 CCR section 18702.4(a)(1) states as follows:

§ 18702.4. Exceptions

"(a) Making or participating in making a governmental decision shall not include:

"(1) Actions of public officials which are solely ministerial, secretarial, manual, or clerical;"

8. Respondent contends that DBAW failed to properly designate him as an employee required to file a Statement of Economic Interests in that the Appendix to DBAW's CIC does not list his civil service classification, Civil Engineering Associate, as one of the "Designated Employees." Respondent therefore contends that his position is not "specifically enumerated" in DBAW's CIC, as required by Government Code section 87302(a). Respondent cites no authority for the requirement that "specific enumeration of the positions within the agency," requires the use of civil service classifications. Government Code section 87302(a) does not specify the manner in which employees must be designated. As set forth in Finding 7, FPPC has accepted the use of working titles as well as civil service classifications to designate employee positions in agency CICs. The California Supreme Court has stated, "In determining the proper interpretation of a statute and the validity of an

administrative regulation, the administrative agency's construction is entitled to great weight, and if there appears to be a reasonable basis for it, a court will not substitute its judgment for that of the administrative body." (*Ontario Community Foundation, Inc. v. State Board of Equalization* (1984) 35 Cal. 3d. 811, 816). The Supreme Court has also stated, "...an administrative interpretation which has been in existence for a number of years is entitled to particular consideration since it 'suggests legislative acquiescence'," (*Campbell Industries v. State Board of Equalization* (1985) 167 Cal.App.3d 863, quoting *Great Western Financial Corp. v. Franchise Tax Board* (1971) 4 Cal.3d 1, 7).

9. Respondent argues that his job title is not "Project Manager" and he is not considered to be a project manager by his supervisor. Respondent therefore contends that DBAW's CIC does not give respondent "Notice and Fair Warning" of his status as a designated employee and his duty to file SEIs "in a language that the common world will understand, of what the law intends to do if a certain line is passed," citing *McBoyle v. U.S.* (1931) 283 U.S. 25, 27. In particular, respondent points to the fact that DBAW is in the process of amending its CIC to add civil service classifications to its Appendix list of designated employees, and that DBAW has stated that the changes to the CIC are made "for purposes of clarity and specification," as set forth in Finding 45, thereby implying that the Appendix as currently written is vague and unclear. Respondent's argument is not persuasive. Respondent used the working job title of "Project Manager" in correspondence related to his work as a CEA for at least two years, from September 1998 through at least December 8, 2000, as set forth in Finding 9. Although respondent chose to discontinue the use of that working title, his job duties did not change, and he continued to act as a project manager on the projects to which he was assigned as a CEA for DBAW.

10. Respondent objects to the use of a duty statement for the position of CEA promulgated by respondent's supervisor and not "approved" by the Department of Personnel Administration or the union as a basis for determining whether respondent is a "Project Manager." Duty statements must be submitted to the code reviewing body (in this instance, FPPC) as part of the initial adoption or amendment of a CIC, per 2 CCR section 18750(e)(1)(G). However, as set forth in Finding 6, the agency is not required to submit revised duty statements to FPPC unless the agency intends to amend its CIC. The regulations do not require that the duty statement be "approved" in any particular manner.

11. Respondent contends that DBAW's attempt to use generic working titles rather than civil service classifications to designate employee positions in the Appendix to its CIC is a way to circumvent the requirements of Government Code section 87306 that an agency amend its CIC "when change is necessitated by changed circumstances, including the creation of new positions which must be designated pursuant to subdivision (a) of Section 87302 and relevant changes in the duties assigned to existing positions." However, there is no evidence of changed circumstances in this case; nor was there evidence that CEAs at DBAW have been exempt from the requirement to file SEIs at any time since the DBAW's CIC was adopted in 1981. Thus, respondent's argument that he was deprived of "notice" and "opportunity" to contest changes in CEA job duties as part of the Government Code section 87306 amendment process is without merit.

12. As set forth in Finding 11, respondent's actual job duties demonstrate that he is an employee who participates in the making of decisions which may foreseeably have a material effect on financial interests, within the meaning of Government Code section 82019(c) and 2 CCR sections 18701(a)(2)(A), 18702, 18702.2, 18702.4(a)(1) and 18730(b)(2) as incorporated by reference in DBAW's CIC. Respondent is properly designated as an employee required to file SEIs under DBAW's CIC, as set forth in Findings 7, 8, 9 and 10.

Respondent's Failure to File Statements of Economic Interest

13. Government Code section 81004(a) states as follows:

§ 81004. Verification of reports; Perjury offenses

"(a) All reports and statements filed under this title shall be signed under penalty of perjury and verified by the filer. The verification shall state that the filer has used all reasonable diligence in its preparation, and that to the best of his knowledge it is true and complete."

14. Government Code section 87300 states as follows:

§ 87300. Agency Requirement

"Every agency shall adopt and promulgate a Conflict of Interest Code pursuant to the provisions of this article. A Conflict of Interest Code shall have the force of law and any violation of a Conflict of Interest Code by a designated employee shall be deemed a violation of this chapter."

15. Government Code section 87302(b) provides that an agency's Conflict of Interest Code shall require each designated employee to file statements at specified times (Finding 3).

16. 2 CCR section 18730(b)(5), as incorporated by reference into DBAW's CIC (14 CCR section 8600), requires designated employees to file assuming office statements of economic interests within 30 days after assuming the designated position (2 CCR section 18730(b)(5)(B)), and requires all designated employees to file annual statements of economic interests no later than April 1 (2 CCR section 18730(b)(5)(C)) (Findings 4 and 5).

17. 2 CCR section 18730(b)(7) states in pertinent part as follows:

§ 18730. Provisions of Conflict of Interest Codes

"(7) Section 7. Manner of Reporting

"Statements of economic interests shall be made on forms prescribed by the Fair Political Practices Commission and supplied by the agency,..."

18. It was not established that respondent violated Government Code section 87300 by failing to file an assuming office SEI by June 13, 1998, as required by Government Code section 87302(b) in conjunction with 2 CCR section 18730(b)(5)(B), in that respondent was not notified of his obligation to file and assuming office SEI by DBAW's filing officer, Kathy Emery, and was not informed of this requirement until he received correspondence from FPPC Investigator Bill Motmans on February 15, 2001, as set forth in Findings 13 and 28.

19. Respondent violated Government Code section 87300 by failing to file an assuming office SEI within 30 days of having been informed of his obligation to do so, i.e., by March 17, 2001, as required by Government Code section 87302(b) in conjunction with 2 CCR section 18730(b)(5)(B), in that respondent has not at any time up to the date of hearing filed an assuming office SEI, as set forth in Finding 14.

20. Respondent violated Government Code section 87300 by failing to file an annual SEI for the period from May 14, 1998 through December 31, 1998 by April 1, 1999, as required by Government Code section 87302(b) in conjunction with 2 CCR section 18730(b)(5)(C), as set forth in Findings 15, 16 and 17.

21. Respondent violated Government Code section 87300 by failing to file an annual SEI for the period from January 1, 1999 through December 31, 1999 by April 3, 2000, as required by Government Code section 87302(b) in conjunction with 2 CCR section 18730(b)(5)(C), as set forth in Findings 21, 22, 23, 24 and 25.

22. Respondent violated Government Code section 87300 by failing to file an annual SEI for the period from January 1, 2000 through December 31, 2000 by April 2, 2001, as required by Government Code section 87302(b) in conjunction with 2 CCR section 18730(b)(5)(C), as set forth in Findings 30, 31, 32, 33, 34 and 35.

23. As set forth in Findings 41 and 42, respondent prepared Conflict of Interest disclosure forms for the period from May 13, 1998 through December 31, 2001, as well as an altered Form 700 SEI for the period from May 13, 1998 through December 31, 2001 and filed them with FPPC. However, these filings did not satisfy the requirement that respondent file SEIs, in that the filings were not on forms prescribed by FPPC and supplied by DBAW, as required by 2 CCR section 18730(b)(7), and were not signed under penalty of perjury, as required by Government Code section 81004(a) (Finding 43).

24. Respondent attempted to argue that he was unable to sign a Form 700 SEI under penalty of perjury because to do so would violate a sincerely held religious belief. However, as set forth in Finding 44, respondent did not testify at hearing because he was unwilling to acknowledge that he could be prosecuted for perjury if he knowingly gave false

testimony at hearing. Respondent's assertion of his religious beliefs effectively prevented any competent (i.e. non-hearsay) evidence of those beliefs from coming into the record.

25. Respondent contends that he is only required to file SEIs if he has reportable interests. In support of this argument, respondent cited language in the California Voters Pamphlet for the June 4, 1974 Primary Election as it pertained to Proposition 9, the Political Reform Initiative, that created the Political Reform Act. The analysis by the Legislative Counsel stated in part as follows:

> "*Conflicts of Interest.* This initiative, like existing law, would prohibit any public official from participating in governmental decisions in which he has a financial interest unless his participation is required by law. **While under existing law, such an interest must be specifically disclosed, no such disclosure is required under the initiative.** Under the initiative, governmental employees and consultants, as well as public officials, would be covered and each public agency would be required to adopt a conflict of interest code for its officers and employees." (Emphasis supplied)

Respondent's reliance on the highlighted language is misplaced; while the meaning is not entirely clear, it apparently refers to the disclosure of financial interests when a public official (as opposed to a governmental employee) is required by law to participate in a governmental decision. The language does not support respondent's argument that he would not be required to file disclosure statements if he did not have any interests to disclose. The analysis by the Legislative Counsel went on to state as follows:

> "*Financial Disclosure Statements.* The law now requires designated state and local officers and candidates to file financial disclosure statements.
>
> "This initiative would enact substantially similar provisions, except that judges would not be covered. State and local agencies would be required to designate officers and employees who would file financial disclosure statements."

In any event, it is reasonable to interpret the requirements for filing SEIs, "on forms prescribed by the Fair Political Practices Commission," i.e., on the Form 700, to include by inference the requirement that designated employees verify that they have no reportable interests if they would be obligated to disclose reportable interests.

Penalty for Violations

26. As set forth in Government Code section 83116, after it has been determined that a violation has occurred, the following remedies may be imposed: a cease and desist order may be issued; the violator may be required to file any reports, statements, or other documents or information required by law; and the violator may be required to pay a monetary penalty. The maximum monetary penalty that may be imposed for the violations set forth in Legal Conclusions 19, 20 and 21 is $2,000 per violation. The maximum

monetary penalty that may be imposed for the violation set forth in Legal Conclusion 22 is $5,000.

27. With respect to the imposition of a monetary penalty, 2 CCR section 18361(e)(4) states as follows:

§ 18361. Enforcement Proceedings

"(4) 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:

"(A) The seriousness of the violation;

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

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

"(D) 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);

"(E) 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

"(F) Whether the violator, upon learning of a reporting violation, voluntarily filed amendments to provide full disclosure."

28. In applying the criteria of 2 CCR section 18361(e)(4) to the facts herein, the violations committed by respondent were serious, in that the failure to complete SEIs by designated employees would thwart a central purpose of the Political Reform Act, namely to prevent conflicts of interest on the part of government employees, such as respondent, who holds a position of public trust that allows him to participate in the spending of the public's money. Respondent's failure to file SEIs was not motivated by intent to conceal, deceive or mislead. Respondent's violations are deliberate, in that he has knowingly refused to file SEIs in a format prescribed by law and regulation, despite being given numerous opportunities to comply.

With respect to the question of whether respondent demonstrated good faith by consulting FPPC staff or any other government agency, it is clear that respondent has consistently maintained that he is not subject to the reporting requirements of the Political Reform Act because he does not believe that he is a properly designated employee under the DBAW's CIC. He presented his arguments to DBAW, and DBAW's filing officer, Kathy Emery, notified respondent in August of 1999 that she would be referring the matter to FPPC

(Finding 18). Ms. Emery made FPPC aware of respondent's concerns via the letter from Ms. Emery to Dixie Howard on November 5, 1999. FPPC did not formally respond to the issues raised by respondent, and Ms. Emery did not communicate to respondent the oral response she apparently received from Ms. Howard (Findings 19-20). When respondent continued to assert his position that he was not required to file SEIs, DBAW submitted the matter to FPPC for enforcement action in May of 2000 (Finding 27). However, respondent was not contacted by the FPPC until February of 2001, at which time he requested a hearing to contest whether he was required to file SEIs under DBAW's CIC (Findings 28-29). Respondent was not informed that there was an alternative procedure to dispute his status as a designated employee of DBAW until he received the Order Re: Probable Cause on June 29, 2001 (Finding 39). Respondent was served with the Accusation in this matter approximately one month later, on July 31, 2001 (Finding 40). Under all the circumstances herein, respondent acted in good faith in attempting to resolve the issue of whether or not he was a properly designated employee under DBAW's CIC.

Respondent's violations are part of a pattern, consistent with his assertion that he was not legally required to file SEIs. As set forth in Findings 41 and 42, respondent made some attempt to provide disclosure of the information required on the annual SEIs; however, the format in which the disclosures were made did not comply with applicable statutes and regulations.

FPPC argues strenuously that respondent deserves to have the maximum penalties imposed for the violations herein, both to punish him for his past violations and to deter future violations. However, considering all of the factors set forth above, monetary penalties in the mid-range would be reasonable and appropriate.

29. In its Closing Brief, FPPC argued that the administrative law judge should grant injunctive relief pursuant to Government Code section 91003 "...to compel compliance with the provisions of this title." Government Code section 91003(a) states as follows:

§ 91003. Injunctions

"(a) Any person residing in the jurisdiction may sue for injunctive relief to enjoin violations or to compel compliance with the provisions of this title. The court may in its discretion require any plaintiff other than the commission to file a complaint with the commission prior to seeking injunctive relief. The court may award to a plaintiff or defendant who prevails his costs of litigation, including reasonable attorney's fees."

Government Code section 91003 clearly pertains to court actions, not to administrative proceedings. If respondent continues to violate the law, FPPC may seek injunctive relief in the Superior Court.

30. All other arguments of the parties not specifically addressed herein were considered and are rejected.

ORDER

1. Respondent Larry R. Danielsen shall cease and desist from violating Government Code section 87300 by failing and refusing to file Statements of Economic Interests as required by Government Code section 87302(b) in conjunction with 2 CCR section 18730(b)(5)(B) and (C).

2. Respondent shall file an assuming office Statement of Economic Interests for the period from May 14, 1997 to May 13, 1998 within 30 days from the effective date of this Decision.

3. Respondent shall file separate annual Statements of Economic Interests for the periods from May 14, 1998 to December 31, 1998; January 1, 1999 through December 31, 1999; and January 1, 2000 through December 31, 2000, within 30 days from the effective date of this Decision.

4. By reason of the violation set forth in Legal Conclusion 19, respondent shall pay a civil penalty of $1,000 within 30 days from the effective date of this Decision.

5. By reason of the violation set forth in Legal Conclusion 20, respondent shall pay a civil penalty of $1,000 within 30 days from the effective date of this Decision.

6. By reason of the violation set forth in Legal Conclusion 21, respondent shall pay a civil penalty of $1,000 within 30 days from the effective date of this Decision.

7. By reason of the violation set forth in Legal Conclusion 22, respondent shall pay a civil penalty of $2,500 within 30 days from the effective date of this Decision.

Dated: October 9, 2002

Catherine B. Frink

CATHERINE B. FRINK
Administrative Law Judge
Office of Administrative Hearings