

California Fair Political Practices Commission

MEMORANDUM

To: Chair Ravel, Commissioners Eskovitz, Garrett, Montgomery and Rotunda

From: John W. Wallace, Acting Executive Director
Zackery P. Morazzini, General Counsel

Re: Consideration of Petition to Amend 18705.5

Date: February 27, 2012

I. Introduction

This proposal to amend Regulation 18705.5 was submitted by Ash Pirayou of Rutan and Tucker on behalf of the Cities of Anaheim, Dana Point, Irvine, La Palma, Newport Beach, San Clemente, Villa Park, and Yorba Linda pursuant to Section 11426 of the 1974 Administrative Procedures Act, which provides that any interested person may petition a state agency and request the adoption, amendment, or repeal of a regulation.

II. Background

Regulation 18705.5(b), which according to the regulatory reference, interprets and clarifies Sections 87100, 87102.5, 87102.6, 87102.8 and 87103 of the Act¹ currently provides:

“The financial effects of a decision which affects only the salary, per diem, or reimbursement for expenses the public official or a member of his or her immediate family receives from a federal, state, or local government agency shall not be deemed material, unless the decision is to appoint, hire, fire, promote, demote, suspend without pay or otherwise take disciplinary action with financial sanction against the official or a member of his or her immediate family, or to set a salary for the official or a member of his or her immediate family which is different from salaries paid to other employees of the government agency in the same job classification or position, or when the member of the public official’s immediate family is the only person in the job classification or position.”
[Emphasis added.]

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

Thus, Regulation 18705.5 currently provides that:

- A decision which affects only the salary, per diem, or reimbursement for expenses the public official or a member of his or her immediate family receives from a federal, state, or local government agency is *generally not a disqualifying material financial effect*.
- When a decision that affects government salary is to appoint, hire, fire, promote, demote, suspend without pay or otherwise take disciplinary action with financial sanction against the official or a member of his or her immediate family, or to set a salary for the official or a member of his or her immediate family which is different from salaries paid to other employees of the government agency in the same job classification or position, or when the member of the public official's immediate family is the only person in the job classification or position, *disqualification will be required if the decision will result in an increase of \$250 or more to the income of the official*.

The petitioners and cities have several council members who are appointed by a vote of each respective city council to serve on the governing boards of legally established joint powers authorities, special districts, or other similar agencies that pay the appointed councilmember \$250 or more in a 12-month period. Petitioners seek to add an exception to Regulation 18705.5 that will provide that an official may make, participate in making, or use his/her official position to influence or attempt to influence, a government decision on his/her appointment to a committee, board, or commission of a public agency.

III. Analysis of the Proposal

The proposed amendment would limit the effect of a 2005 Commission amendment to Regulation 18705.5 that added the word "appoint" to the prohibited conduct in Regulation 18705.5. The Petitioners emphasize the following arguments in support of the proposal:

1. They believe the current regulation is contrary to the Act's express language as set forth in Section 82030(b)(2).

Staff would dispute this assertion that Regulation 18705.5 lacks statutory authority. Section 82030(b)(2) was indeed an original provision of the Act and provides an exception for "government salary" from the definition of income. However, historically while the exception has been applied broadly in the interpretation of Sections 87207(a) and 87302(b)(disclosure of income), it was applied only in a limited fashion in Section 87103. Essentially, it was applied to find that the source of Government agency income, the public agency employer, was not a "source of income" for purposes of Section 87103(c). Section 87103 of the original Act simply listed five economic interests in subdivisions (a) through (e)².

² Note that pre-1985 Section 87103(c) and (e) created an economic interest in the *source of a payment*, not in the income or gift itself. In other words, a conflict is not created concerning changes to the quality or quantity of income or the gift that the official receives, but only in connection with decisions affecting the source of these payments (once they reached the statutory threshold). A decision's effect on the amount of income or gift the official receives was not directly addressed by the statute.

In 1985, the Commission sponsored legislation that added language to the introductory phrase as follows: “An 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 or a member of his or her immediate family” This created a sixth economic interest in the official’s personal finances. This is commonly referred to as the Personal Financial Effect rule (or PFE).

That same year the Commission adopted a regulation interpreting the new language that included some of the same language that exists in the current regulation. The 1985 version of the rule, then numbered Regulation 18702.1, specifically addressed the effect of the amendment on government income. The 1985 language provided:

(a) Except as provided in subsection (c), a public official shall not make, participate in making, or use his or her official position to influence a governmental decision if:

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(4) It is reasonably foreseeable that the personal expenses, income, assets, or liabilities of the official or his or her immediate family will be increased or decreased by at least \$250 by the decision.

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(c) Notwithstanding subsection (a) an official does not have to disqualify himself or herself from a governmental decision if:

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(2) The decision only affects the salary, per diem, or reimbursement for expenses the official or his or her spouse receives from a state or local government agency. This subsection does not apply to decisions to hire, fire, promote, demote, or discipline an official’s spouse which is different from salaries paid to other employees of the spouse’s agency in the same job classification or position;

The Olson Advice Letter, No. A-85-242, discussed the effect of the amendment and regulation as follows³:

“An 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

³ Note that the version of the regulation existing at the time the *Olson* letter was issued only applied the “hire-fire” language to spouses of the official.

financial effect, distinguishable from its effect on the public generally, on the official or a member of his or her immediate family [Footnote 3: Section 87103 was amended by Chapter 611 of the Statutes of 1985 to include the under-lined language. However, the Commission has previously interpreted the Act's conflict of interest disqualification provisions as including effects upon members of the official's immediate family. See 2 Cal. Adm. Code Section 18702.1.]

* * *

“With respect to the salary of spouses who work for state or local government there are two exceptions to the general rule. Salary from such an agency is not income within the meaning of the Act. Section 82030(b)(2). Thus, the government entity in question is not a source of income under section 87103(c) and the official may make decisions affecting the agency.

“With regard to effects upon the amount of pay received, the recent amendments to section 87103, cited above, would require disqualification as to decisions affecting a spouse's pay.”

Thus, the historical record is fairly clear that as of 1985 the Commission decided the new amendment to Section 87103 applied even to government income, under limited circumstances, and explicitly stated so in the regulation.

Consequently, the Petitioners' argument that Regulation 18705.5, which has existed in some form even before 1985, is an invalid regulatory amendment to Section 82030 is inaccurate. Rather, the Commission had to consider Section 82030(b)(2) in light of the later 1985 amendment to Section 87103 and sought to harmonize the two acts of the legislature. The Commission at the time made a reasonable policy interpretation of the new statutory language and at the time had the advantage of the legislative history that we do not.

While Petitioner's amendments are far narrower than any remedy that might be suggested by this first argument, staff felt it necessary to address the common misperception that this regulation is either “new” or without statutory basis.

2. The Petitioners point to the fact that the Commission's stated policy purposes for amending Regulation 18705.5 in 2005 related to concerns arising from appointments of a public official's spouse versus concerns relating to participation in decisions to appoint oneself to an Appointed Paid Board.

This is an accurate statement. While the amendment and memorandum were clear on their face that the amendment would apply to officials who appointed themselves to paid

positions,⁴ the two examples provided to the Commission concerned appointment of the officials' spouses. Even under the Petitioner's narrow proposed amendment, an official would not be permitted to appoint his or her spouse.

3. Arguably, while the Commission's efforts to "harmonize the two acts of the Legislature" should be commended in 1985, a vigorous analysis must be undertaken to evaluate whether the express language of the Act found in Section 82030(b)(2), as adopted in 1974 by the voters, can be swallowed up and undermined by the Commission's subsequently adopted regulation in 1985 relating to a different statute as amended by the Legislature (i.e., Section 87103).

First, the Act may be amended by a two-thirds vote of the Legislature if the amendment furthers the purposes of the Act, or by a vote of the people. The 1985 amendment, a Commission sponsored amendment, passed with two-thirds vote of the Legislature. There can be no dispute that the amendment to Section 87103, as construed by the Commission, furthers the purposes of the Act.

4. The concerns that were addressed by the 1985 amendments to Section 87103 and the subsequent language proposed at the time by the Commission contained a specific limitation to the PFE rule: the treatment of a spouse by the official that was somehow different than the treatment of other employees in the same classification in the same agency. The aim of this specific language (arguably) even in 1985 was to stop certain abuses, such as those outlined in the Commission's 2005 Staff memorandum (e.g., where a public official made a decision to increase his spouse's salary when she was the only person in that classification or where a mayor appointed his spouse to an unsalaried position), versus impacting the very public process for making appointments to Appointed Paid Boards.

As noted in number 2, the examples were limited to hiring or appointing spouses. However, the fact that a vote occurs in public (whether it be to appoint oneself, hire an official's spouse, or rezone the official's house) is not relevant. The majority of conflict of interest scenarios the Commission deals with are votes or participation in public sessions.

On the other, staff was mindful in discussions Petitioners and city attorneys that the application of the rule has caused some hardship on the local agencies. For example, while not noted in the Petition, the Commission should be aware that pursuant to a 2002 legislative amendment, certain public officials, including city council members and county supervisors, must leave the room when they have a conflict of interest in a given decision. (Section 87105.) Thus, the application of this rule to the officials not only prohibits them from voting but requires them to leave the room while the voting is taking place.

⁴ This would not suggest that the application of the amendment to the official was not clear. Both the March and May 2005 memorandum stated: "By adding the word 'appoint' to the regulation, the Commission would make it clear to a public official that it is unlawful for a public official to appoint *the official* or his or her spouse or dependent children to a position that is salaried..." [Emphasis added.]

5. To the extent that the PFE rule, the expansion of the “hire-fire” rule to appointments, and the Act’s specific statutory language found in Section 82030(b)(2) are in conflict, the regulated community should be provided the opportunity to address this conflict with the Commission, as requested in this Petition.

The 2005 amendments, which were clearly set out in draft language and in the staff memorandum, were considered at two Commission meeting. Both meetings were conducted under the Bagley Keene open meeting rules. The memoranda and draft regulations were available to the public 10 days in advance of the meeting. Moreover, the language considered at the May adoption meeting was advertised to the public in Office of Administrative Law’s Notice Register for 30 days.

6. Any policy decision that results in the expansion of the “hire-fire” rule by the application of the PFE rule to appointments to paid boards should be done after careful consideration of the practical governance issues arising from such a rule, as outlined in our November Letter.

The specific rule has been around since 2005. However, staff agrees that this item raises a policy issue that should be considered by the Commission. Staff would never suggest that any Commission, present or past, did not carefully consider regulatory amendments presented to them. However, it is true, that no testimony from the public was offered on the item in 2005.

7. The proposed amended Regulation 18705.5 would make it clear that it is limited in application to appointments of public officials to paid boards versus any decision of the public official as it relates to his or her immediate family or the official himself in those situations unrelated to appointment (e. g., the public official is an employee of the agency).

We agree with this statement. The Petitioners proposed amendment (as modified) is narrowly tailored to the decision at issue. While it seems self-evident that an official’s decision to appoint himself or herself to a paid governmental decision is at a minimum the appearance of a conflict of interest⁵, we do believe that other factors, such as burdens on the regulated public, should be considered in deciding on a final rule, as well as alternatives, as discussed further below.

IV. Conclusion and Staff Recommendation

Staff believes that the ultimate resolution of this issue is a policy decision for the Commission. As noted above, staff believes that the current prohibition is justified -- that there is an apparent financial conflict of interest when an official seeks to appoint himself or herself to one or more paid positions.

⁵ “The Act seeks to prevent more than actual conflicts of interest; it seeks to prevent even the appearance of a possible conflict of interest.” (*Witt v. Morrow* (1977) 70 Cal.App.3d 817, at 823.)

However, staff agrees that as a regulatory agency we cannot be blind to the burdens placed on those citizens that accept the responsibility to govern. Thus, staff would recommend that if the Commission agrees, after hearing testimony, that the burden of compliance with the existing rule, outweighs the rule effectiveness, then the Commission should accept the narrow exception presented by the Petitioners.

The Petition's modified version has additional safeguards supported by staff -- including:

- The list of public entities covered by the exception is no longer open-ended. The new language applies only to appointments to committees, boards, or commissions of a public agency, special districts, joint powers agencies or authorities, joint powers insurance agencies or authorities, or a metropolitan planning organization.
- The Petitioners have also added language that the positions covered by the exception are only those for which the official is expressly appointed by order of the appointing body, by ordinance or resolution of the appointing body, or pursuant to state law.
- The third limiting factor added by Petitioners would add an additional level of transparency to these matters. The proposal would require that the agency adopt and post on its website, on a form provided by the Commission, a list that sets forth each appointed position for which compensation is paid, the salary or stipend for each appointed position, the name of the public official who has been appointed to the position and the name of the public official, if any, who has been appointed as an alternate, and the term of the position. By posting this information, it allows the public to look at the broader issue of fair compensation for these additional duties, and may have a greater beneficial impact than sporadic enforcement complaints and warning letters.

Thus, if the Commission wishes to limit the "appointment" prohibition, staff would support Petitioner's revised language as an effective way to achieve this.

Attached

1. Petitioner's current Proposal
2. The Petitioner's Petition and Attachments