



FAIR POLITICAL PRACTICES COMMISSION

428 J Street • Suite 620 • Sacramento, CA 95814-2329

(916) 322-5660 • Fax (916) 322-0886

February 21, 2014

Dennis Eagan, Deputy Attorney General
Board of Pilot Commissioners for the Bays
of San Francisco, San Pablo and Suisun
660 Davis Street
San Francisco, CA 94104

Via U.S. mail and e-mail

Re: Appeal of Denied Petition to add the position of Port Agent to the Conflict of Interest Code of the Board of Pilot Commissioners for the Bays of San Francisco, San Pablo and Suisun ("Board of Pilot Commissioners")

Dear Mr. Eagan:

Please find enclosed a copy of the Order Pursuant to Government Code § 87307 and a supporting memorandum on the decision.

You may contact the Commission at (916) 322-5660 should you have any questions regarding the enclosures.

Sincerely,

A handwritten signature in black ink, appearing to read "Zackery P. Morazzini".

Zackery P. Morazzini,
General Counsel

ER:jgl

Enclosures

cc: Mike Jacob, Vice President & General Counsel
Pacific Merchant Shipping Association

BEFORE THE FAIR POLITICAL PRACTICES COMMISSION
STATE OF CALIFORNIA

In the Matter of:)

) **ORDER PURSUANT TO**
) **GOVT. CODE § 87307**

Appeal of Pacific Merchant Shipping Assoc.)
re: Board of Pilot Commissioners' Conflict)
of Interest Code Decision)
_____)

The Fair Political Practices Commission hereby issues its order regarding the appeal of Pacific Merchant Shipping Association ("PMSA") from a decision of the Board of Pilot Commissioners ("Board"), which declined to amend its Conflict of Interest Code to add the position of Port Agent to its list of designated employees. PMSA timely appealed under Government Code section 87307, and the appeal is hereby granted. The evidence submitted by both parties establishes that the Port Agent makes or participates in the making of governmental decisions, as defined at Title 2, California Code of Regulations, Sections 18702.4 and 18702.2. Accordingly, under Government Code section 87302, the Port Agent must be enumerated in the Board's Conflict of Interest Code as a designated employee.

The Board has a right of appeal to the Commission under Regulation 18750(f)(2); it may also seek judicial review of this order pursuant to Government Code section 87308.

IT IS SO ORDERED.

Dated: February 21, 2014

FAIR POLITICAL PRACTICES COMMISSION

By: 
_____)
Zackery Morazzini, General Counsel

Fair Political Practices Commission

MEMORANDUM

To: Mike Jacob, Vice President & General Counsel
Pacific Merchant Shipping Association

Dennis Eagan, Deputy Attorney General
Board of Pilot Commissioners for the Bays
of San Francisco, San Pablo and Suisun

From: Zackery Morazzini, General Counsel

Subject: Appeal to FPPC by PMSA re: Board of Pilot Commissioners'
Conflict of Interest Code Decision

Date: February 21, 2014

Introduction

Section 87300 requires every agency to adopt and promulgate a Conflict of Interest Code. Section 87301 requires that all such codes “shall be formulated at the most decentralized level possible.”¹

Section 87302 states provisions required of any agency Conflict of Interest Code, the first among them being a specific enumeration of positions within the agency which involve the making or participation in making of decisions which may foreseeably have a material effect on any financial interest of persons known as “designated employees.”

Section 82019 provides that a “designated employee” means any officer, employee, member, or consultant of any agency whose position with the agency:

“(1) Is exempt from the state civil service system by virtue of subdivision (a), (c), (d), (e), (f), (g), or (m) of Section 4 of Article VII of the Constitution, unless the position is elective or solely secretarial, clerical, or manual.

“(2) Is elective, other than an elective state office.

¹ This is an important, practical requirement since remote code reviewing bodies like the FPPC cannot be well acquainted with the actual day-to-day operations of the myriad boards and commissions scattered throughout the state, most of whose organization charts and job titles will have been created with an eye to traditions or functionality that have nothing to do with provisions of the Act.

“(3) 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) Is involved as a state employee at other than a clerical or ministerial level in the functions of negotiating or signing any contract awarded through competitive bidding, in making decisions in conjunction with the competitive bidding process, or in negotiating, signing, or making decisions on contracts executed pursuant to Section 10122 of the Public Contract Code.

Finally, Section 87307 provides that an “agency may at any time amend its Conflict of Interest Code, subject to the provisions of Section 87303, either upon its own initiative or in response to a petition submitted by an officer, employee, member or consultant of the agency, or a resident of the jurisdiction. If the agency fails to act upon such a petition within ninety days, the petition shall be deemed denied. Within thirty days after the denial of a petition, the petitioner may appeal to the code reviewing body. The code reviewing body shall either dismiss the appeal or issue an appropriate order to the agency within ninety days.”

Procedural Background

Pacific Merchant Shipping Association (“PMSA”), a California non-profit corporation based in San Francisco, has requested that the state Board of Pilot Commissioners (“Board”) amend its Conflict of Interest Code to include the position of Port Agent. PMSA represents ocean carriers that are required by law to utilize state-licensed pilots.

The Board declined to amend its code arguing that because the title of Port Agent does not neatly fit under the literal language of the definition of a “designated employee,” the Port Agent is not subject to the Act. Moreover, they assert that the position does not participate in the Board’s decisionmaking process, and that the Port Agent’s duties, ascribed by statute and regulation, are purely “advisory” or ministerial in nature.

PMSA, timely appealed the Board’s denial to the FPPC, the board’s code reviewing body. Section 87307 gives the FPPC 90 days within which to resolve this appeal by issuing “an appropriate order.”

As more fully explained below, there is no real dispute between the parties as to any fact pertinent to the requested code amendment. However, both parties differ substantially on how to interpret the Political Reform Act (“Act”). Applying the pertinent facts to the Act, I conclude that the Port Agent, in execution of his statutory and regulatory duties, acts an officer or agent of the Board and is a public official who makes or participates in the making of governmental decisions by the Board.

Factual Background

The California Legislature established the Board in 1850 (*Harb. & Nav. Code, § 1101, subd. (g)*). The Board licenses and regulates marine pilots on San Francisco Bay and its tributaries.² (*Harb. & Nav. Code, § 1101, subd. (g)*.) The Board is comprised of seven members, appointed by the Governor with Senate consent. Two members are required to be licensed pilots, two members represent the shipping industry, and three are members of the public. (*Harb. & Nav. Code, § 1100 et. seq.*) (*Harb. & Nav. Code, § 1150.*) In 2009, the Legislature put the Board under the authority of the Transportation Agency³ (formerly the Business, Transportation and Housing Agency). The secretary of that agency serves as an ex officio member of the Board. (*Harb. & Nav. Code, § 1150, subd. (d)*.)

The San Francisco Bar Pilots (“Bar Pilots”) is a private unincorporated association of pilots licensed by the Board. The 58 maritime pilots are members of the Association and they control operation of the business and split the profits amongst themselves. With very limited exceptions, pilots licensed by the Board have “exclusive authority . . . to pilot vessels from the high seas to Monterey Bay and the Bays of San Francisco, San Pablo, and Suisun and the ports

² “The Legislature finds and declares that it is the policy of the state to ensure the safety of persons, vessels, and property using Monterey Bay and the Bays of San Francisco, San Pablo, and Suisun, and the tributaries thereof, and to avoid damage to those waters and surrounding ecosystems as a result of vessel collision or damage, by providing competent, efficient, and regulated pilotage for vessels required by this division to secure pilotage services.” (*Harb. & Nav. Code, § 1100.*)

³ The Board originally existed as a state commission without having been included in the Governor’s cabinet structure. It became a constituent department of the Business, Transportation and Housing Agency on January 1, 2009. The Agency Secretary, a cabinet member of the Governor, exercises general oversight and supervision over the Board. The Commission’s expenses are paid for by industry through surcharges on pilotage fees and not by state or local taxes. Pursuant to statute, most vessels calling at the ports and terminals located in the waters of the Bays of San Francisco are subject to compulsory pilotage. Accordingly, there are state regulated rates that the pilots charge for their services. Rates are set by the Legislature upon the recommendation of the Board. The Board makes its rate recommendations after a formal public hearing requested by any party directly affected by pilotage rates.

thereof, and from those bays and ports to the high seas,” as well as “exclusive authority to pilot vessels within and along the waters of those bays” (*Harb. & Nav. Code*, § 1125, *subd. (a)*); see §§ 1132–1133.) Fees for most, but not all, pilotage services are set by statute. (See *Harb. & Nav. Code*, §§ 1190–1191.)

PMSA is a private trade association comprised of companies that own or operate ocean-going vessels in California waters. Its members pay the fees for private pilot services provided by members of the Bar Pilots.

The Port Agent is a licensed pilot nominated by a majority of the Bar Pilots, subject to confirmation by the Board. (*Harb. & Nav. Code*, § 1130; *Cal. Code Regs.*, tit. 7, § 218, *subd. (a)*.) Among the Port Agent’s duties are “to carry out the orders of the Board, under applicable laws, and to otherwise administer the affairs of the pilots.” (*Cal. Code Regs.*, tit. 7, § 218, *subd. (a)*.) The Port Agent is responsible for the “supervision and management of all matters related to the business and official duties of pilots” (*Harb. & Nav. Code*, § 1130, *subd. (b)*; *Cal. Code Regs.*, tit. 7 § 218, *subd. (b)*) and the specific responsibility of assigning pilots to vessels and closing the San Francisco Bar for reasons of public, pilot, or vessel safety. (*Cal. Code Regs.*, tit. 7 § 218, *subd. (d)(1)*). The Port Agent does not serve as a member of the Board and receives no compensation from the Board (see *Cal. Code Regs.*, tit. 7 §§ 206, 207).

The Port Agent has certain statutory and regulatory reporting obligations⁴ to the Board, including:

- The requirement to immediately notify the Board’s executive director of any suspected violation, navigational incident, misconduct, or other rules violation that the Port Agent witnesses or receives a report. (*Harb. & Nav. Code*, § 1130, *subd. (c)*.)
- Collection of data, preparation of accounts and making of payments to the Board required of pilots by statute and regulation, including the name, class, high gross tonnage and deep draft of each vessel subject to pilotage. (*Cal. Code Regs.*, tit. 7, § 218, *subd. (d)(4)*.)
- Reporting of all accidents, groundings, collisions or other similar navigational incidents involving a vessel to which a pilot has been assigned, as well as suspected pilot misconduct, including all pertinent details of the incident as set forth in the regulation. (*Cal. Code Regs.*, tit. 7, § 218, *subd. (d)(6)*.)

⁴ The list of Port Agent duties are enumerated in *Harb. & Nav. Code* § 1130 et seq., and in *Board of Pilot Commissioners v. Superior Court*, 218 Cal. App. 4th 577.

- Reporting of any matter in the Port Agent’s opinion that affects the ability of a pilot to carry out his or her lawful duties. (*Cal. Code Regs., tit. 7, § 218, subd. (d)(8).*)
- Reporting whenever any pilot is absent from duty because of illness lasting longer than seven days, including the nature of the illness, the probable duration absence and the anticipated date of return to duty. (*Cal. Code Regs., tit. 7, § 218, subd. (f).*)

Summary of Evidentiary Materials Submitted by the Parties

A. Appellant PMSA’s Account

Appellant PMSA’s materials are presented in a lengthy appellate brief, including seven numbered attachments, filed with the FPPC on November 22, 2013, and other supplemental materials in letters submitted January 17, 2014 and February 7, 2014.

On September 16, 2013, PMSA petitioned the Board to add the Port Agent to its list of “designated employees” in its conflict of interest code. The Board denied PMSA’s petition on October 24, 2013, concluding that the Port Agent was not a “designated employee.”

PMSA states in its materials, much of which are arguments about application of the law to the facts, that the Port Agent meets the broad definition of a public official as he is a “member” of the Board. PMSA also argues that the Port Agent may also be an officer or employee of Board. PMSA contends that the Port Agent carries out the orders of the Board and “exercises authority on the Board’s behalf.” In addition, appellant argues that the Board holds out the Port Agent as a member of the Board’s staff to the public, even listing the position on its website “Staff” page. PMSA concedes that the Port Agent is not a “consultant” to the Board as the Port Agent does not perform his duties pursuant to a contract.

PMSA states that the Port Agent “makes governmental decisions” when “exercising his authority on behalf of the public and in the scope of his day-to-day execution of his public duties . . .” (PMSA Appeal, page 12.) PMSA also contends that the Port Agent makes governmental decisions in the course of his statutory and regulatory duties and that the Port Agent may “obligate” the Board to “enforce the actions of the Port Agent,” in investigating matters in misconduct and other proceedings.

The seven attachments submitted by PMSA include: PMSA’s petition to the Board to amend its conflict of interest code; the Board’s decision denying the PMSA petition to amend the Board’s code; a letter to the Port Agent from the California Business, Transportation and

Housing Agency compelling him to provide pilotage services to a docking ship in the wake of a rate-setting dispute; electronic messages from the Port Agent to the Oakland wharf master detailing the rate dispute and the Port Agent's apparent intention to refuse to provide pilotage services to ships that do not pay a surcharge; relevant case law and other background information.

Attachment 6 is the California Court of Appeal case, *Board of Pilot Commissioners v. Superior Court* (2013) 218 Cal.App.4th 577. The court there held that the Port Agent is a "state officer" within the meaning of the California Public Records Act. The court in *Board of Pilot Commissioners* noted that:

"While the Port Agent in his capacity as president of the Bar Pilots, may have many entirely private duties and serve as 'liaison' with the Board, he also has responsibilities imposed by statute and administrative regulation. The Port agent is charged with responsibility 'for the general supervision and management of all matters related to the business and *official duties* of pilots.' (*Harb. & Nav. Code § 1130 subd. (b)*, italics added; *Regs., § 218, subd. (b)*, italics added.) The Port Agent's enumerated duties include assigning pilots to vessels (*Regs., § 218, subd. (d)(1)*). . . . We find that the Port Agent must be considered a state officer, at least when performing the official duties provided by statute or Board regulation." (*Board of Pilot Commissioners v. Superior Court* (2013) 218 Cal.App.4th 577, 589.)

B. Respondent Board's Account

The Board's materials are presented as a brief dated January 17, 2014, and in a supplemental brief dated February 7, 2014.

The Board argues the Port Agent is not a "designated employee" because he is not an "officer, employee, member, or consultant" of a state agency. The Board makes the following specific arguments:

- The Port Agent is not a "consultant" because he does not perform services on behalf of the Board pursuant to a contract.
- The Port Agent is not a "member" of the Board, as all seven voting members of the Board are appointed by the Governor, and one ex officio member, the Secretary of the California State Transportation Agency, who does not have a vote.

- The Port Agent is not an “officer” of the Board; The Board has two officers, a President and a Vice President, both created by statute (Cal. Code Regs., tit. 7, § § 206, 207), and the Port Agent occupies neither position.
- There is no employer-employee relationship between the Board and the Port Agent; the relationship between the Board and the Port Agent is one between a regulatory agency and one who is regulated. (i.e. The Board is the regulating agency and the port agent is a principal object of the Board’s regulatory authority.) The Port Agent does not receive any compensation from the Board, there is no employer-employee relationship between the Board and the Port Agent, and the Executive Director is not charged with supervising his work.

The Board argues that because the Port Agent does not fit the above titles or categories, the Port Agent is not a public official.

The Board also states that the Port Agent does not have “decisionmaking authority,” that in taking instruction from the Board, the Port Agent is not making “government decisions.” The Board argues that the Port Agent’s compliance with the Board’s regulations, such as assigning pilots to vessels, incident reporting, reporting of pilot incapacity, or closing the San Francisco Bar for safety reasons, are not “governmental decision[s];” but are decisions made in the course of operating the Bar Pilot’s private business – the “orderly operation of a private business that is essential to maritime commerce.”

The Board also contends that the Port Agent does not act on behalf of the Board in performing his governmental or sovereign functions. The Board cites the *Board of Pilot Commissioners v. Superior Court* case, stating: “The Bar pilotage is a recognized but regulated monopoly, and the Board has statutory licensing and oversight authority. But it is the individually licensed members of the Bar Pilots who render piloting services directly to their maritime clients, not on behalf of the Board. And the Legislature has never given the Board authority to make pilot assignments *or to direct them.* (Italics added.)”

The Board argues that “[i]t is the Board that exercises regulatory power over the port agent through regulations and occasional directives in furtherance of the state’s regulatory regime. While performing duties required of him by the state’s regulatory program, the port agent is not acting ‘on behalf of’ the Board or as the Board’s ‘agent’ nor do his actions ‘obligate the state.’” The Board states that it has statutory licensing and oversight authority but the individually licensed members of the San Francisco Bar Pilots (including the Port Agent) render piloting services directly to their maritime clients, not on behalf of the Board. Assigning pilots to vessels or deciding for safety reasons whether to close the San Francisco Bar to shipping are not

Board functions. However, as a matter of regulation, the Board has required the port agent to perform these and other functions.

The Board also references the decision in *Board of Pilot Commissioners v. Superior Court* (2013) 218 Cal.App.4th 577, which presented a question of statutory interpretation as to whether the Port Agent was a “state officer” within the meaning of the California Public Records Act. The court held that the Port Agent was barred from arguing that it was not a “state officer” under the Public Records Act due to the doctrine of “judicial estoppel.” The court noted that the Port Agent had successfully argued in another case that as a “state official,” the Port Agent was immune from suit in federal district court under the Eleventh Amendment to the U.S. Constitution. The Board contends that the court has barred the Port Agent from asserting he is not a “state officer” under the Public Records Act, but that the ruling does not apply to the Board and the Board is not required to treat the Port Agent as one of its officers, employees, members or consultants under the Act.

Finally, the board points out that the bar pilots and Port Agent have their own special “conflict of interest code” (Cal. Harb. & Nav. Code Section 1170.3; Cal. Code Regs., tit. 7, § 222) which prohibits them from having “any interest in, or derive[ing] any income from, any tugboat [operating on the pilotage grounds].” The Legislature adopted this section 10 years after the passage of the Act.

Application of Law to the Facts Presented on Appeal

The Act defines a “designated employee” as “any officer, employee, member, or consultant of any agency” (Section 82019.) The materials submitted by both parties in this matter establish that in carrying out his duties, the Port Agent is an officer of the Board that makes and participates in the making of governmental decisions.

The Act does not specifically define the term “officer” of an agency. However, there are definitions in parts of the Act that assist in determining the meaning of this term. For instance, under Section 82004, the term “Agency Official”⁵ is defined as “any member, *officer*, employee or consultant of any state agency who as part of his official responsibilities participates in any

⁵ Although this definition of “agency official” has in the past primarily been used in the lobbying context, it is instructional in the present context.

administrative action⁶ in other than a purely clerical, secretarial or ministerial capacity.” (Emphasis added.)

Under Section 87400 a “state administrative official” means “every member, *officer*, employee or consultant of a state administrative agency who as part of his or her official responsibilities engages in any judicial, quasi-judicial or other proceeding in other than a purely clerical, secretarial or ministerial capacity.” (Emphasis added.)

Under the established facts and applicable law, the Port Agent must be considered a state officer when performing the official duties provided by statute and Board regulation.⁷ In the exercise or discharge of certain statutory and regulatory duties, the Port Agent not only makes governmental decisions but also assists the Board in the exercise of its statutory duties, such as ensuring proper pilot licensing, discipline, investigations and safety of the pilots.

Further, the Port Agent is an “officer” of the Board because the position in its official responsibilities is not purely “clerical, secretarial or ministerial” in capacity, but requires that the Port Agent make and participate in the making of governmental decisions.”

Port Agents Make Governmental Decisions Under the Act:

A public official makes a governmental decision, for purposes of the Act’s conflict of interest rules, as described in Regulation 18702.4, when the official, acting within the authority of his or her office or position:

“(1) Votes on a matter;

“(2) Appoints a person;

“(3) Obligates or commits his or her agency to any course of action;

“(4) Enters into any contractual agreement on behalf of his or her agency;

⁶ Under Section 82002, “administrative action” is defined as “either of the following: (1) The proposal, drafting, development, consideration, amendment, enactment, or defeat by any state agency of any rule, regulation, or other action in any ratemaking proceeding or any quasi-legislative proceeding, which shall include any proceeding governed by Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2.”

⁷ This finding is consistent with the appellate court’s holding in *Board of Pilot Commissioners v. Superior Court, supra*.

“(5) Determines not to act, within the meaning of subdivisions (a)(1), (a)(2), (a)(3). . .”

The Port Agent, in the discharge of his statutory and regulatory duties of assigning pilots to vessels and for the general supervision and management of business and official duties of pilots, serves as an officer of the Board and makes governmental decisions under the Act.

The Port Agent, in making pilot assignments and performing general supervision and management of licensed pilots, “obligates or commits” the Board to a certain course of action. For instance, the Port Agent makes a governmental decision when assigning pilots to vessels; this decision commits the Board, which bears the ultimate responsibility for ensuring proper pilot licensing and fitness for duty.

The Port Agent is not a free agent who has independent authority to make pilot assignments – or refuse to make such assignments – without any supervision or oversight. While this may be a specific function of the Port Agent, the Board has general oversight responsibility over this function,⁸ and in its incapacity or failure to act, the California Transportation Agency may step in. For instance, during a recent rate setting dispute involving the Bar Pilots, the Port Agent at the time reportedly made some “threats to refuse to pilot” a ship that was scheduled to dock in San Francisco Bay.

In a June 17, 2011 letter⁹ the Acting Secretary of the Business Transportation and Housing Agency, Traci Stevens, ordered then Port Agent Bruce Horton to “take every action under your authority to ensure the full, complete, and appropriate pilotage of the cargo vessel” The Acting Secretary stated, “This order is necessary because there is insufficient time for the Board to conduct a public meeting to consider this issue (Gov. Code §11120 et. seq.) and a failure to ensure pilotage of [the vessel] could have serious adverse economic, transportation, and other consequences.”

Likewise, when the Port Agent determines to close the San Francisco Bar for reasons of public, pilot or vessel safety, this decision commits or obligates the Board to that course of action. And while this function is specific to the Port Agent through his statutory duties, this

⁸ Harb. & Nav. Code § 1154 subd. (a) vests the board with all functions and duties necessary to administer the laws governing bar pilots. It is organized under the California Transportation Agency (Harb. & Nav. Code § 1150, subd. (a); Gov. Code § 13975.)

⁹ PMSA Appeal Attachment 4.

power to make a governmental decision to close a public waterway emanates from the state.¹⁰ The Port Agent, in his private capacity as president of the Bar Pilots, could not close down public waters. This is a power reserved for the state and delegated to the Port Agent in discharging his public duties. And while the Board is not specifically delegated this duty, it has general oversight authority over the Port Agent in performing this function and “is vested with all functions and duties necessary to administer the laws governing bar pilots.”¹¹ It is the Board whose office was specifically created to, and who bears the ultimate responsibility for, avoiding damage to waters of the Monterey Bay and the Bays of San Francisco, San Pablo and Suisun and to provide competent, efficient, regulated pilotage for vessels. (*Harb. & Nav. Code*, § 1100.)

Port Agents “Participate” in the Making of Governmental Decisions Under the Act:

Although the Port Agent does not on his own gather and assesses evidence regarding pilot accidents or incidents, or determine what facts warrant license discipline, he provides valuable input and information to the Board that helps the Board make a decision with respect to these issues. Without the Port Agent’s input through monthly written and oral reports, recommendations, and analysis regarding pilot availability and absences, confidential written reports of pilots who have been absent for medical reasons, the Board would likely have insufficient information to make determinations that are crucial in fulfilling its statutory obligations.

For instance, the Port Agent’s reports, observations and analysis assist the Board in: determining the appropriate number of bar pilots available for duty (if a shortage is noted, or an unusually high number of exemptions for minimum rest periods are reported, for instance, this may indicate a need for more pilots and/or pilot trainees); determining whether a pilot’s license may be properly renewed or suspended; and ensuring pilot safety by preventing pilot fatigue and accidents by upholding pilot minimum rest periods and keeping exceptions to a minimum. The Port Agent also makes pilot assignments, which assists the Board in promoting pilot safety, assuming that the Port Agent takes into account required minimum rest periods for pilots and keeps exceptions to the rule at a minimum.

A public official participates in making governmental decisions, for purposes of the Act’s conflict of interest rules, as described in Regulation 18702.2, when acting within the authority of his or her position, the official:

¹⁰ “The power of the state to control, regulate and utilize its navigable waterways ...when acting within the terms of the [public] trust, is absolute....” (*Marks v. Whitney*, 6 Cal. 3d 251, 260.)

¹¹ *Harb. & Nav. Code* § 1154, sub. (a).

“(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).”

When the Board does make governmental decisions, application of Regulation 18702.2 to the agreed facts indicates that the Port Agent indeed *participates* in making those decisions. The facts presented and the Board’s minutes of its public hearings indicate that the Port Agent prepares monthly reports to the Board, sits at the Commission table with the members and staff of the Board, presents documents as well as his oral or written monthly report directly to the decision makers (the voting members of the Board), and on occasion comments presents opinions on policy matters before the Board. The Port Agent advises the Board, provides documents and information to the decisionmakers *both* directly *and* without significant intervening substantive review, prepares and presents reports, analysis and opinions orally and in writing.

In presenting these various reports, the Port Agent is not merely passing along information to the Board. He is often exercising discretion and judgment. For instance, in reporting “*any matter in the Port Agent’s opinion that affects the ability of a pilot to carry out his or her lawful duties,*”¹² the Port Agent exercises considerable discretion and judgment in not

¹² Cal. Code Regs., tit. 7, § 218, subd. (d)(8) emphasis added.

only bringing the matter to the Board's attention, but also in preparing the materials in an attempt to persuade the Board. Also, in his reporting of pilot absences lasting longer than seven days, the Port Agent must exercise discretion and judgment in preparing the materials and making the appropriate determination as to the probable duration of the absence and anticipated return to duty. (Cal. Code Regs., tit. 7, § 218, subd. (f).)

Although many of the reports include statistics and hard data, some of the tasks require the exercise of judgment, with a purpose to influence the Board's decisions. Thus while the Board denies any influence or control that Port Agent reports and/or recommendations may have on the voting members of the Board, the evidence offered by both parties show that the Port Agent's reports, recommendations, opinions and analysis fit squarely within the Act's definition of *participating* in the making of governmental decisions.

Therefore, based on the evidence presented, the Port Agent~~s~~ makes and participates in making governmental decisions as defined under the Act and therefore this position must be in the Board's conflict of interest code as a designated employee.