

1 GARY S. WINUK
Chief of Enforcement
2 MILAD DALJU
Commission Counsel
3 **FAIR POLITICAL PRACTICES COMMISSION**
428 J Street, Suite 620
Sacramento, CA 95814
4 Telephone: (916) 322-5660
5 Facsimile: (916) 322-1932

6 Attorneys for Complainant
7

8 BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

9 STATE OF CALIFORNIA

10 In the Matter of) FPPC No. 10/289
11)
12)
13 SUSAN BURY,) DEFAULT DECISION AND ORDER
14)
15 Respondent.) (Gov. Code §§ 11506 and 11520)
16)

17 Complainant Gary S. Winuk, Chief of the Enforcement Division of the Fair Political Practices
18 Commission, hereby submits this Default Decision and Order for consideration by the Fair Political
19 Practices Commission at its next regularly scheduled meeting.

20 Pursuant to the California Administrative Procedure Act,¹ Respondent Susan Bury has been
21 served with all of the documents necessary to conduct an administrative hearing regarding the above-
22 captioned matter, including the following:

- 23 1. An Order Finding Probable Cause;
- 24 2. An Accusation;
- 25 3. A Notice of Defense (Two Copies);

26
27 ¹The California Administrative Procedure Act, which governs administrative adjudications, is contained in Sections
11370 through 11529 of the Government Code.

1 4. A Statement to Respondent; and

2 5. Copies of Sections 11506, 11507.5, 11507.6 and 11507.7 of the Government Code.

3 Government Code Section 11506 provides that failure of a respondent to file a Notice of Defense
4 within 15 days after being served with an Accusation shall constitute a waiver of respondent's right to a
5 hearing on the merits of the Accusation. The Statement to Respondent, served on Respondent Susan
6 Bury, explicitly stated that a Notice of Defense must be filed in order to request a hearing. Respondent
7 Susan Bury failed to file a Notice of Defense within 15 days of being served with the Accusation.

8 Government Code Section 11520 provides that, if the respondent fails to file a Notice of
9 Defense, the Commission may take action, by way of a default, based upon the respondent's express
10 admissions or upon other evidence, and that affidavits may be used as evidence without any notice to the
11 respondent.

12 Respondent Susan Bury violated the Political Reform Act as described in Exhibit 1, and
13 accompanying declaration, which are attached hereto and incorporated by reference as though fully set
14 forth herein. Exhibit 1 is a true and accurate summary of the law and evidence in this matter. This
15 Default Decision and Order is submitted to the Commission to obtain a final disposition of this matter.

16
17
18 Dated: _____

Gary S. Winuk
Chief of Enforcement
Fair Political Practices Commission

1 **ORDER**

2 The Commission issues this Default Decision and Order and imposes an administrative penalty
3 of \$6,000 upon Respondent Susan Bury, payable to the “General Fund of the State of California.”

4 IT IS SO ORDERED, effective upon execution below by the Chair of the Fair Political Practices
5 Commission at Sacramento, California.

6 Dated: _____

7 _____
8 Ann Ravel, Chair
9 Fair Political Practices Commission

EXHIBIT 1

INTRODUCTION

Respondent Susan Bury (“Respondent”) was a commissioner on the Madera County Economic Development Commission (the “EDC”) from July 9, 2007 to April 1, 2009. As a commissioner on the EDC, Respondent was a designated employee as defined in Section 82019, subdivision (a), of the Political Reform Act (the “Act”)¹. As a designated employee, Respondent was required to timely file an Annual Statement of Economic Interests (“SEI”) and a Leaving Office SEI.

This matter arose out of a referral received by the Fair Political Practices Commission’s Enforcement Division (the “Enforcement Division”) from the Madera County Clerk (the “MCC”) alleging Respondent failed to file statements of economic interests required by the Act. The subsequent investigation by the Enforcement Division revealed that Respondent not only failed to file an Annual SEI and a Leaving Office SEI, as required by the Act, but also sent the MCC an SEI cover page with “none your business!” written across the entire page.

For the purposes of this Default Decision and Order, Respondent’s violations of the Act are stated as follows:

COUNT 1: As a designated employee and a member of the Madera County Economic Development Commission, Respondent Susan Bury had a duty to file an Annual Statement of Economic Interests for the January 1, 2008, through December 31, 2008, period, by April 1, 2009, with the Madera County Clerk. Respondent Susan Bury failed to file an Annual Statement of Economic Interests for January 1, 2008, through December 31, 2008, period, by April 1, 2009, with the Madera County Clerk, in violation of Government Code sections 87300 and 87302, subdivision (b).

COUNT 2: As a designated employee and a member of the Madera County Economic Development Commission, Respondent Susan Bury had a duty to file a Leaving Office Statement of Economic Interests for the January 1, 2009, through April 1, 2009, period, by May 1, 2009, with the Madera County Clerk. Respondent Susan Bury failed to file a Leaving Office Statement of Economic Interests for the January 1, 2009, through April 1, 2009, period, by May 1, 2009, with the Madera County Clerk, in violation of Government Code sections 87300 and 87302, subdivision (b).

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.

DEFAULT PROCEEDINGS UNDER THE ADMINISTRATIVE PROCEDURE ACT

When the Fair Political Practice Commission (the “Commission”) determines that there is probable cause for believing that the Act has been violated, it may hold a hearing to determine if a violation has occurred. (Section 83116.) Notice of the hearing, and the hearing itself, must be conducted in accordance with the Administrative Procedure Act (the “APA”).¹ (Section 83116.) A hearing to determine whether the Act has been violated is initiated by the filing of an accusation, which shall be a concise written statement of the charges specifying the statutes and rules which the respondent is alleged to have violated. (Section 11503.)

Included among the rights afforded a respondent under the APA, is the right to file the Notice of Defense with the Commission within 15 days after service of the accusation, by which the respondent may (1) request a hearing, (2) object to the accusation’s form or substance or to the adverse effects of complying with the accusation, (3) admit the accusation in whole or in part, or (4) present new matter by way of a defense. (Section 11506, subd. (a)(1)-(6).)

The APA provides that a respondent’s failure to file a Notice of Defense within 15 days after service of an accusation constitutes a waiver of the respondent’s right to a hearing. (Section 11506, subd. (c).) Moreover, when a respondent fails to file a Notice of Defense, the Commission may take action based on the respondent’s express admissions or upon other evidence, and affidavits may be used as evidence without any notice to the respondent. (Section 11520, subd. (a).)

PROCEDURAL REQUIREMENTS AND HISTORY

A. Initiation of the Administrative Action

Section 91000.5 provides that “[t]he service of the probable cause hearing notice, as required by Section 83115.5, upon the person alleged to have violated this title shall constitute the commencement of the administrative action.” (Section 91000.5, subd. (a).)

Section 83115.5 prohibits a finding of probable cause by the Commission unless the person alleged to have violated the Act is 1) notified of the violation by service of process or registered mail with return receipt requested; 2) provided with a summary of the evidence; and 3) informed of his right to be present in person and represented by counsel at any proceeding of the Commission held for the purpose of considering whether probable cause exists for believing the person violated the Act. Additionally, Section 83115.5 states that the required notice to the alleged violator shall be deemed made on the date of service, the date the registered mail receipt is signed, or if the registered mail receipt is not signed, the date returned by the post office.

Section 91000.5 provides that no administrative action pursuant to Chapter 3 of the Act, alleging a violation of any of the provisions of Act, shall be commenced more than five years after the date on which the violation occurred.

¹ The California Administrative Procedure Act, which governs administrative adjudications, is contained in Sections 11370 through 11529 of the Government Code.

Documents supporting the procedural history are included in the attached Certification of Records (“Certification”) filed herewith at Exhibit A, A-1 through A-8, and incorporated herein by reference.

In accordance with Sections 83115.5 and 91000.5, the Enforcement Division initiated the administrative action against Respondent in this matter by serving her with a Report in Support of a Finding of Probable Cause (the “Report”) dated October 4, 2011. (Certification, Exhibit A-1.) Respondent was served by certified mail, return receipt requested.¹ The original return receipt addressed to Respondent was signed on October 12, 2011, and was returned to the Enforcement Division. (Certification, Exhibit A-2.) Therefore, the administrative action commenced on October 12, 2011, the date the registered mail receipt was signed, and the five year statute of limitations was effectively tolled on this date.

As required by Section 83115.5, the packet served on Respondent contained a cover letter, dated October 4, 2011, and a memorandum describing Probable Cause Proceedings, advising that Respondent had 21 days in which to request a probable cause conference and/or to file a written response to the Report. (Certification, Exhibit A-3.) Respondent neither requested a probable cause conference nor submitted a written response to the Report.

B. Ex Parte Request for a Finding of Probable Cause

Since Respondent failed to request a probable cause conference or submit a written response to the Report by the statutory deadline, the Enforcement Division submitted an Ex Parte Request for a Finding of Probable Cause and an Order that an Accusation be Prepared and Served to General Counsel Zackery P. Morazzini on November 28, 2011. (Certification, Exhibit A-4.) Respondent was sent copies of these documents. (Certification, Exhibit A-5.)

On December 1, 2011, General Counsel Zachery P. Morazzini issued a Finding of Probable Cause and Order to Prepare and Serve an Accusation. (Certification, Exhibit A-6.)

C. The Issuance and Service of the Accusation

Under the Act, if the General Counsel makes a finding of probable cause, an accusation shall be prepared pursuant to Section 11503 of the APA, and it shall be served on the persons who are the subject of the probable cause finding. (Regulation 18361.4, subd. (e).)

Section 11503 states:

A hearing to determine whether a right, authority, license or privilege should be revoked, suspended, limited or conditioned shall be initiated by filing an accusation. The accusation shall be a written statement of charges which shall set forth in ordinary and concise language the acts or omissions with which the respondent is charged, to the end that the respondent will be

¹ Where any communication is required by law to be mailed by registered mail to or by the state, or any officer or agency thereof, the mailing of such communication by certified mail is sufficient compliance with the requirements of the law. (Section 8311.)

able to prepare his defense. It shall specify the statutes and rules which the respondent is alleged to have violated, but shall not consist merely of charges phrased in the language of such statutes and rules. The accusation shall be verified unless made by a public officer acting in his official capacity or by an employee of the agency before which the proceeding is to be held. The verification may be on information and belief.

Section 11505, subdivision (a), requires that, upon the filing of the accusation, the agency shall 1) serve a copy thereof on the respondent as provided in Section 11505, subdivision (c); 2) include a post card or other form entitled Notice of Defense which, when signed by or on behalf of the respondent and returned to the agency, will acknowledge service of the accusation and constitute a notice of defense under Section 11506; 3) include (i) a statement that respondent may request a hearing by filing a notice of defense as provided in Section 11506 within 15 days after service upon the respondent of the accusation, and that failure to do so will constitute a waiver of the respondent's right to a hearing, and (ii) copies of Sections 11507.5, 11507.6, and 11507.7.

Section 11505, subdivision (b), sets forth the language required in the accompanying statement to the respondent.

Section 11505, subdivision (c), provides that the Accusation and accompanying information may be sent to the respondent by any means selected by the agency, but that no order adversely affecting the rights of the respondent shall be made by the agency in any case unless the respondent has been served personally or by registered mail as set forth in Section 11505.

On December 9, 2011, the Commission's Chief of Enforcement, Gary S. Winuk, issued an Accusation against Respondent in this matter. In accordance with Section 11505, the Accusation and accompanying information, consisting of a Statement to Respondent, two copies of a Notice of Defense Form, copies of Government Code Sections 11506, 11507.5, 11507.6 and 11507.7, and a cover letter dated December 12, 2011, were personally served on Respondent on December 21, 2011. (Certification, Exhibit A-7.)

Along with the Accusation, the Enforcement Division served Respondent with a "Statement to Respondent" which notified them that they could request a hearing on the merits and warned that, unless a Notice of Defense was filed within 15 days of service of the Accusation, they would be deemed to have waived the right to a hearing. Respondent did not file a Notice of Defense within the statutory time period, which ended on January 5, 2012.

As a result, on February 3, 2012, the Enforcement Division sent a letter to Respondent advising her that this matter would be submitted for a Default Decision and Order at the Commission's public meeting scheduled for March 15, 2012. A copy of the Default Decision and Order, and this accompanying Exhibit 1 with attachments, was included with the letter. (Certification, Exhibit A-8.)

SUMMARY OF THE LAW

An express purpose of the Act, as set forth in Section 81002, subdivision (c), is to ensure that the assets and income of public officials, that may be materially affected by their official actions, be disclosed, so that conflicts of interests may be avoided. In furtherance of this purpose, Section 87300 requires every agency to adopt and promulgate a Conflict of Interest Code.

The following reflects the Act as it was in effect at the time of the relevant violations.

Disclosure Provisions

Section 82019, subdivision (a), defines “designated employee” to include any member of any agency whose position 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.” Additionally, Section 87302, subdivision (a), provides that an agency’s Conflict of Interest Code must specifically designate the positions within the agency that are required to file SEI’s, disclosing reportable investments, business positions, interests in real property, and sources of income. Thus, designated employees must file SEI’s under the Act.

Section 87302, subdivision (b), provides that an agency’s Conflict of Interest Code must require each designated employee of the agency to file an Annual SEI at a times specified in the agency’s Conflict of Interest Code, disclosing investments, income, business positions, and interests in real property, held or received at anytime during the previous calendar year.

An agency’s conflict of interest code may incorporate Regulation 18730, which contains a model conflict of interest code, by reference. If so, then the filing deadline is April 1. (Regulation 18730(b)(5)(C)). If not incorporated, an agency’s conflict of interest code must specify a filing date. Madera County’s Conflict of Interest Code incorporates Regulation 18730, and thus, the filing deadline for annual statements of economic interests for the designated employees of Madera County is April 1.

Section 87302, subdivision (b), also requires that an agency’s Conflict of Interest Code must require each designated employee of the agency to file a Leaving Office SEI within 30 days of leaving office, disclosing investments, income, business positions, and interests in real property, held or received during the period between the closing date of the last statement required and the date of leaving office.

Under Section 87300, the requirements of an agency’s Conflict of Interest Code have the force of law, and any violation of those requirements is deemed a violation of the Act.

SUMMARY OF THE FACTS

This matter arose out of referral from the MCC, the filing officer for the EDC. Respondent was a commissioner on the EDC from July 9, 2007, until April 1, 2009. The

Conflict of Interest Code for Madera County designates commissioners on the EDC as designated employees, and Madera County has incorporated Regulation 18730 by reference. Therefore Respondent was required to file a 2008 Annual SEI by April 1, 2009, and a Leaving Office SEI by May 1, 2009.

On or about April 7, 2009, the MCC sent Respondent a letter advising Respondent that Respondent's 2008 Annual SEI was past due and requesting that Respondent file the statement with MCC within 30 days. (Certification, Exhibit A-9.)

On or about January 8, 2010, the MCC sent Respondent a letter requesting that Respondent file a Leaving Office SEI with the MCC by February 8, 2010. (Certification, Exhibit A-10.) The letter advised Respondent that if the delinquent statement was not received by February 8, 2010, the matter would be referred to the Enforcement Division.

Sometime between January 8, 2010, and March 17, 2010, MCC received a SEI cover page from Respondent with the following message diagonally handwritten in large letters across the page: "Susan Bury's Response None of your Business!" (Certification, Exhibit A-11.)

On or about March 17, 2010, MCC sent a letter to Respondent informing Respondent that Respondent's 2008 Annual SEI and Leaving Office SEI were past due, and that the MCC was referring the matter to the Enforcement Division. (Certification, Exhibit A-12) On April 1, 2010, the Enforcement Division received the referral from the MCC for Respondent's failure to file a 2008 Annual SEI and a Leaving Office SEI. (Certification, Exhibit A-13.)

On or about November 8, 2010, and again on or about December 15, 2010, the Enforcement Division sent a letter to Respondent regarding Respondent's failure to file a 2008 Annual SEI and a Leaving Office SEI. To date, Respondent has not filed either of the delinquent statements with the MCC or the Commission.

Accordingly, Respondent committed two violations of the Act, as follows:

COUNT 1

Failure to File a 2008 Annual Statement of Economic Interests

As a designated employee and a member of the Madera County Economic Development Commission, Respondent Susan Bury had a duty to file an Annual Statement of Economic Interests for the January 1, 2008, through December 31, 2008, period, by April 1, 2009, with the Madera County Clerk. Respondent Susan Bury failed to file an Annual Statement of Economic Interests for the January 1, 2008, through December 31, 2008, period, by April 1, 2009, with the Madera County Clerk, in violation of Government Code sections 87300 and 87302, subdivision (b).

COUNT 2

Failure to File a Leaving Office Statement of Economic Interests

As a designated employee and a member of the Madera County Economic Development Commission, Respondent Susan Bury had a duty to file a Leaving Office Statement of Economic Interests for the January 1, 2009, through April 1, 2009, period, by May 1, 2009, with the Madera County Clerk. Respondent Susan Bury failed to file a Leaving Office Statement of Economic Interests for the January 1, 2009, through April 1, 2009, period, by May 1, 2009, with the Madera County Clerk, in violation of Government Code sections 87300 and 87302, subdivision (b).

CONCLUSION

This matter consists of two counts of violating the Act, which carry a maximum administrative penalty of \$5,000 per count, for a total maximum administrative penalty of \$10,000.

In determining the appropriate penalty for a particular violation of the Act, the Enforcement Division considers the typical treatment of a violation in the overall statutory scheme of the Act, with an emphasis on serving the purposes and intent of the Act. Additionally, the Enforcement Division considers the facts and circumstances of the violation in context of the factors set forth in Regulation 18361.5, subdivision (d)(1)-(6): the seriousness of the violations; the presence or lack of intent to deceive the voting public; whether the violation was deliberate, negligent, or inadvertent; whether the respondent(s) demonstrated good faith in consulting with Commission staff; whether there was a pattern of violations; and whether upon learning of the violation the respondent voluntarily filed amendments to provide full disclosure. The facts are required to be considered by the Commission under Regulation 18361.5.

Failure to file a SEI is a serious violation of the Act because it deprives the public of important information about a public official's economic interests which could lead to potential conflicts of interests regarding decisions s/he may make in his/her official capacity.

Recent penalties approved by the Commission concerning violations of Sections 87300 and 87302, subdivision (b), include:

- *In the Matter of Armida Torres*, FPPC No. 09/816 (Default Decision). A penalty of \$4,000, \$2,000 per count, was approved by the Commission on September 17, 2010, for respondent's failure to file an Assuming Office SEI and an Annual SEI.

Respondent's violations in this matter are deliberate and part of a pattern of ignoring her duties to file SEI's. Respondent was informed of her duty to file an Annual SEI and a Leaving Office SEI by the MCC and the Enforcement Division. Her response to the MCC's attempts to contact her was to send back a blank SEI to the MCC with a handwritten message with a black marker across the entire page stating "None of your business!" This action by Respondent demonstrates that her violations were not due to negligence or unfamiliarity with the Act.

Rather, Respondent's actions demonstrate that her violations were calculated and deliberate, and that she refuses to mitigate the impact of her violations by filing the delinquent statements.

Additionally, Respondent's refusal to file the delinquent statements deprives the public of knowing whether or not she violated any of the conflict of interest provisions of the Act while she was a member of the EDC. The fact that she refuses to file the delinquent statements even after prosecution by the Enforcement Division leaves unanswered the question of whether she had any assets that may have given rise to a conflict of interest during her service on the MCC.

Further, due to Respondent's intentional violations of the Act, Respondent's filling officer, the MCC, was required spend valuable and limited government resources to send Respondent letters to remind her of her legal obligation to file the delinquent statements. Due to Respondent's failure to cooperate with the MCC's attempts to have Respondent file the delinquent statements, the MCC was again required to spend valuable and limited government resources, this time to refer the case to the Enforcement Division. Then Respondent's intentional refusal to file the delinquent statements even after being contacted several times by the Enforcement Division required the Enforcement Division to spend more valuable and limited government resources to prosecute this matter. Finally, Respondent's refusal to cooperate with the Enforcement Division's attempts to have her file the delinquent statements has required the Commission to hear this default decision.

The imposition of an administrative penalty of \$3,000 per count is recommended. This is in the mid-to-high range of penalties recommended for violations of Sections 87300 and 87302, subdivision (b), and is based on the fact that Respondent's violations were not due to negligence, as are most violations of Sections 87300 and 87302, subdivision (b), but were intentional and more egregious than past violations of Sections 87300 and 87302, subdivision (b), that have reached the default decision stage.

After consideration of the factors of Regulation 18361.5, and consideration of penalties in prior enforcement actions, the imposition of a penalty in the amount of \$6,000 is recommended.

* * * * *