



FAIR POLITICAL PRACTICES COMMISSION

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March 9, 2001

Raymond M. Paetzold
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180 Grand Avenue, Suite 330
Oakland, CA 94612-3741

**Re: Your Request for Informal Assistance
Our File No. I-01-027**

Dear Mr. Paetzold:

This letter is in response to your request for informal assistance regarding provisions of the Political Reform Act (the "Act").¹ You write on behalf of the Board of Pilot Commissioners for the Bays of San Francisco, San Pablo and Suisun.

QUESTION

In light of changes that have taken place over the years in the Board's functions, makeup and staffing, you seek advice on the continued efficacy of the 1978 exemption granted by the Commission, under which the Board was excused from the obligation to promulgate a Conflict of Interest Code.

CONCLUSION

The Board no longer meets express regulatory criteria for exemption, and its circumstances do not warrant a discretionary exemption, from the Act's mandate that government agencies promulgate Conflict of Interest Codes.

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18996, of the California Code of Regulations. You have specifically requested informal assistance on this matter. Informal assistance does not provide the requestor with the immunity provided by a Commission opinion or formal written advice. (Regulation 18329(c).)

FACTS

The Board of Pilot Commissioners for the Bays of San Francisco, San Pablo and Suisun (the "Board") is one of the oldest state agencies in California, having been formed by the acts of the first legislative session in 1850, presently codified at Harbors and Navigation Code Sections 1150 et seq. The Board's function is to license and regulate the ship's pilots who guide commercial vessels into, through, and out of the Bays of San Francisco, San Pablo, and Suisun. The Board is currently made up of seven members: three public members, two pilot members, and two members representing the maritime industry which uses the service of pilots. All are appointed by the Governor and may serve up to two terms of four years each. The Board has two full time employees, an executive director and a secretary/administrative assistant. The former is an exempt appointee, and the latter a civil service employee. The Board also contracts for specialized legal and investigatory services, as needed.

The Board selects pilot trainees, oversees the training program for both trainees and current pilots, and licenses the pilots subject to its oversight. The Board investigates navigational "incidents" to determine the role of pilot error, if any, and it may suspend or revoke a pilot's license for misconduct. The Board also promulgates and enforces rules and regulations governing pilots, and it holds hearings to develop recommendations to the Legislature relating to any changes in pilotage rates.

Soon after the Act went into effect, the Board approached the FPPC's then-standing committee set up to review agency Conflict of Interest Codes, seeking an exemption (under what is now Regulation 18751) from the requirement that it adopt a Conflict of Interest Code. At its meeting of March 7, 1978, the full Commission voted to grant this exemption, which was memorialized in a letter to the Board's president, dated March 13, 1978. The stated grounds for the exemption were simply that the Board had no "designated employees" within the meaning of Section 82019. The Commission may also have taken into account the Board's observation that its scope of authority was narrow and that required governmental decisionmaking was relatively infrequent.

In 1978, the Board consisted of only three compensated members, and its sole employee was a secretary whose duties were evidently ministerial. The Board then regulated a total of 29 pilots, operating out of a one-room office. Today, the Board consists of seven compensated members, occupies a three-room office and regulates 62 pilots. In short, you indicate that the Board has become more proactive in its regulation of pilots and has roughly doubled in size since 1978. The Board has also added a second employee, an executive director whose duties are described in Harbors and Navigation Code Section 1156.5, and regulations found at 7 CCR Section 211. The executive director's responsibilities include personnel administration, service as the Board's treasurer and as a member of the Board's Incident Review Committee, administration and maintenance of files relating to actions taken against licensees, issuance of licenses, and

formulation and recommendation of pilot training curricula. We understand that the executive director may also enter into contracts on behalf of the Board.

Since 1978, the Board's procedures for the selection of pilots have become more sophisticated. Prospective pilots compete to enter an extensive training program based on experience, written examinations and a graded simulator exercise. (See 7 CCR 213). However, the frequency of licensing new pilots is not unlike that in 1978. No new trainees have been selected since 1994, and no new pilots have been licensed since 1998. Indeed, the current number of pilots licensed (62) is greater than the number authorized (56) as the Board awaits a balance in these numbers by pilot attrition or increased vessel traffic. Navigational "incidents" investigated by the Board occur relatively infrequently.

ANALYSIS

Section 87300 provides that:

"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."

The language of this provision has remained unchanged since the adoption of the Act as Proposition 9 in 1974. In 1976 the Commission adopted what is now Regulation 18751, which establishes procedures and standards for requesting exemption from the otherwise broad mandate of Section 87300. The regulation currently in effect provides, in pertinent part, that:

- "(c) A request for exemption shall be approved by the Executive Director only if he or she finds:
- (1) That if the agency requesting the exemption were to adopt a Conflict of Interest Code, there would be no 'designated employees,' within the meaning of Government Code Sections 82019 and 87302(a), subject to its provisions; or
 - (2) That the agency is, or soon will be, inoperative and nonfunctioning.
- (d) An exemption to Government Code Section 87300 may be granted to an agency when there would be no 'designated employees' within the meaning of Government Code Sections 82019 and 87302(a) because all of the following apply:
- (1) The agency does not have regulatory, quasi-regulatory, permit, licensing or planning authority or functions;
 - (2) The agency will not acquire real property in the foreseeable future; and

(3) The annual operating budget exclusive of salaries for the agency is less than \$70,000.

(e) In all other circumstances, the Executive Director will consider the requests for exemption on a case by case basis.”

It seems clear that the Board would not qualify for exemption under subd. (c)(1), because its new executive director would be classified as a “designated employee” under Section 82019, which applies that term to any officer or employee of any agency whose position with the agency is exempt from the state civil service system – unless the position is elective or solely secretarial, clerical, or manual. The executive director, whose duties are listed above, is an exempt employee within the meaning of Section 82019, with responsibilities that cannot be classified as “secretarial” or “clerical.” Further, the Board plainly has regulatory and licensing authority, foreclosing any possibility of exemption under Regulation 18751(c)(1).² Finally, there is no reason to believe that the Board will soon become “inoperative and nonfunctioning,” leaving no basis for an exemption under 18751(c)(2).

While Regulation 18751(c) specifies particular circumstances under which exemptions “shall” be granted, subd. (e) of the same regulation permits discretionary exemptions “in all other circumstances.” The FPPC’s discretion in such matters is not unlimited, however. Most importantly, the mandate of Section 87300 is plainly quite broad. Although Regulation 18751 does provide for exemptions, the FPPC must narrowly construe exceptions to the Act. The FPPC’s limited discretion in this area has demonstrable consequences. Exemptions under Regulation 18751(e) have rarely, if ever, been granted.

In 1978 the Board was entitled to an exemption because it was able to demonstrate that it had no “designated employee” within the meaning of Section 82019. It can no longer make such a showing. What remains is an argument that, although the Board is clearly a regulatory and licensing agency with at least one “designated employee,” the Board’s jurisdiction is limited to a small industry (bay pilots), and it exercises its regulatory and licensing authority infrequently.

The pilots regulated by the Board are charged with protecting human life and a large, valuable commercial shipping industry. The importance of the Board’s functions is not measured by the relatively small number of pilots under its jurisdiction. Similarly, the Board’s relatively infrequent exercise of its regulatory authority does not negate the existence or the significance of that authority. The potential for conflicts of interest is always present when a body has authority to make governmental decisions. We conclude that, as we understand the circumstances, the Board may not continue to exercise its powers without promulgating a Conflict of Interest Code. The grounds for an exemption under Regulation 18751(c) no longer exist, and the Board’s situation simply does not warrant a discretionary exemption.

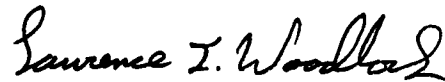
² See Regulation 18751(d), which specifies the circumstances under which an exemption may *not* be granted to a regulatory or permitting agency.

Please bear in mind that the exemption permitted under Regulation 18751(e) is granted at the discretion of the FPPC's executive director. The advice offered in this letter does not in any way preclude the Board from presenting its case to our executive director.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca
General Counsel



By: Lawrence T. Woodlock
Senior Counsel, Legal Division

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