



March 12, 2012

Chair Ann Ravel and Commissioners
Fair Political Practices Commission
428 J Street, Suite 800
Sacramento, CA 95814

RE: Agenda Item 43: Regulation 18705.5

Dear Chair Ravel and Commissioners:

On behalf of the League of California Cities City Attorneys FPPC Committee, I submit this letter for comment on the above-referenced agenda item. The Committee has reviewed the proposed petition and supports amendment of Regulation 18705.5. In this letter, I will explain (1) how the current regulation impacts city council decision-making, (2) how the proposed regulation amendments would address this impact, (3) Commission staff's response to the proposed amendments, (4) the Committee's arguments as to why the regulation should be amended, and (5) the Committee's proposed revisions to the petitioner's amendments.

The Impact of Regulation 18705.5

Under various provisions of state and local law, city councils are frequently called upon to make appointments from their membership to the governing boards of other entities, such as joint powers authorities or special districts. Sometimes these laws provide for compensation or expense reimbursement to be paid to the board members of these external entities for the extra work required.

Government Code Section 87100 prohibits public officials from making, participating in the making of, or using their positions to influence the making of, government decisions in which they have a private financial interest. Section 87103 provides that a public official has a disqualifying financial interest when the decision will have a material financial effect on the official, and that effect is distinguishable from the effect on the public generally.

Regulation 18705.5 is one of several regulations that define when the financial effect of a decision will be considered "material" to the personal finances of a public official. As currently drafted, this regulation defines as material, a decision to appoint a councilmember to the governing board of an external entity, if the board member will receive compensation or reimbursement that equals or exceeds \$250 within any 12 month period for service on that board.

Thus, as Commission staff has explained a city councilmember who participates in a city council decision to appoint themselves to a compensated position on a governing board of an external entity is participating in a decision in which they have a disqualifying financial interest.

The Petition to Amend

The petition seeks to amend this regulation to create an exception to the rule established in the regulation. The proposed amendments would allow a public official to participate in a decision to appoint themselves to the governing board of another agency, even if the appointment will result in compensation or reimbursement to them of more than \$250 in a 12 month period. The proposed regulation would permit this when the appointment is by law to be made by the city council (or other board of which the official is a member.) In addition, the proposed regulation would require the appointing body to publish information about the appointment, including the name of the appointee, the compensation provided, and the term of the appointment.

Staff's Response

In response to the proposed revision, Commission staff explains the historical development of Section 87103 and Regulation 18705.5. Having explained this history and why from staff's perspective Regulation 18705.5 does not conflict with other provisions of the Act, staff goes on to state that the question of whether this regulation should be amended is one of policy. In other words, staff has made clear that there is no legal reason why the Commission should not amend the regulation as proposed if there is a sound policy reason for doing so.

Why the Regulation Should be Amended

The Committee believes Regulation 18705.5 should be revised, because as written the regulation impairs good governmental decision-making. The best decisions are those that are fully informed by the best relevant information. The decisions impacted by this regulation involve the appointment from the council members to serve on a variety external government bodies.

One would expect that in making appointments to a governing body, the most important information in making the appointment is why candidates are interested in the position, and what experiences or interests would make them the best person for the job. Unfortunately, the regulation as written makes explanation of these matters illegal.

For example, if a city council is charged by law with the appointment of one of its members to a transit district, would it not be important to the council to know who might have an interest or particular experience in this area? Moreover, who would be the best source of this information other than the interested council member? Yet, the regulation

prohibits a council member interested in the position from sharing this information. Not only would the council be prohibited from voting on the appointment, but they would also be unable to share their perspective on why they believe they are the best person for the job. The regulations prohibit not only making a decision, but also, using one's position to influence the decision. This includes "appearing before" the council, or "otherwise attempting to influence" the council.

In addition to this fundamental problem, the regulation creates other procedural difficulties. As the City Clerks' letter explains, the regulation not only requires disqualified council members to abstain from the vote, it also requires that they leave the room while the vote is taken. If, as is typical, several appointments are being made at a single meeting, the meeting becomes a session of musical chairs of council members rotating in and out of the room as different appointments are considered.

Moreover, these procedural problems are compounded when there is more than one candidate for a position. For example, if three council members are interested in appointment to one position, they would all be disqualified, leaving two members to choose. However, two members would result in a lack of quorum requiring the three candidates to draw straws to re-establish a quorum for the purposes of making the appointment.

And how do these difficulties balance against the public interest advanced by requiring disqualification from a decision appointing a council representative to an external board? It is hard to see how the public would benefit by the application of this regulation. The laudable purpose of the disqualification rule is to allow for public decision-making by a body that will not be influenced by the private financial impacts of its decisions. In this case, financial impacts on the members of the board cannot be avoided. Someone needs to be appointed, and that someone will be a public official. Allowing all council members to publicly discuss the merits of these appointments, including the merits of their own appointments, makes sense. The potential for corruption in the making of these types of decisions is extremely remote, and does not justify the bizarre impacts on the decision-making process imposed by the current regulation.

Additional Revisions to the Proposed Amendments

While the Committee supports amendment of Regulation 18705.5, we would offer some revisions aimed at clarifying the proposed regulation, and extending its application to a similar situation.

Appointment of Council Officer (Mayor/ Vice Mayor)

The petitioners have requested that the regulation be amended to allow for officials to participate in decisions appointing themselves to positions with external entities. As drafted, the proposal would not authorize a council member to vote on, or argue in support of, their appointment to the position of mayor or vice mayor if those positions receive additional compensation.

In a substantial number of California cities, the position of mayor is rotated among the members of the council and is to be appointed by the full council. The mayor usually acts as the ceremonial representative of the city, and is called on to attend special events, execute important city documents and satisfy other duties above and beyond the expectations of the other members of council. Frequently, cities provide additional compensation to address these additional demands.

For the reasons described above, regulation 18705.5, as drafted, prohibits council members interested in serving as mayor from voting for themselves and from even explaining why they would be good for the job. For the same reasons described above, the Committee believes this policy makes no sense, and unduly impairs the public decision-making process as it relates to the decision of appointing the city's mayor.

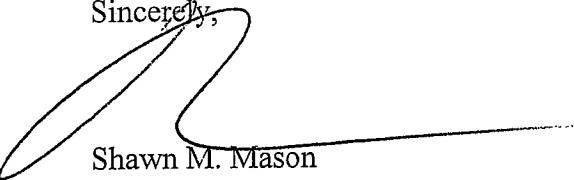
Suggested Clarifications

In reviewing the draft regulation, the Committee was unclear about the intention of the language in two ways. First, the proposed subsection (c) would create an exception to the rule stated in subsection (b) that would allow officials to participate in decisions "...under the following circumstances." The regulation then lists three subsections. It was unclear to the Committee whether each of the circumstances stated in the subsections must be present, or whether any one of them will suffice. The Committee believes the intention was for all three to be present, and proposes a revision to make this clear.

In addition, the Committee was uncertain as to the intention of subsection (c)(2). The Committee believes the intention was to make it clear that the appointment is being made by the council pursuant to some state or local law. The Committee proposes a revision to make this clear.

In conclusion, the Committee respectfully requests that the Commission approve the petition to amend Regulation 18705.5, as amended in the draft attached.

Sincerely,



Shawn M. Mason
City Attorney of San Mateo
Chair, League of Cities FPPC Committee

Enclosure

1 REVISIONS TO 18705.5

2 (Regulations of the Fair Political Practices Commission, Title 2, Division 6, California Code of
3 Regulations.)

4 **§ 18705.5. Materiality Standard: Economic Interest in Personal Finances.**

5 (a) A reasonably foreseeable financial effect on a public official's or his or her
6 immediate family's personal finances is material if it is at least \$250 in any 12-month period.
7 When determining whether a governmental decision has a material financial effect on a public
8 official's economic interest in his or her personal finances, neither a financial effect on the value of
9 real property owned directly or indirectly by the official, nor a financial effect on the gross
10 revenues, expenses, or value of assets and liabilities of a business entity in which the official has a
11 direct or indirect investment interest shall be considered.

12 (b) The financial effects of a decision which affects only the salary, per diem, or
13 reimbursement for expenses the public official or a member of his or her immediate family
14 receives from a federal, state, or local government agency shall not be deemed material, unless the
15 decision is to appoint, hire, fire, promote, demote, suspend without pay or otherwise take
16 disciplinary action with financial sanction against the official or a member of his or her immediate
17 family, or to set a salary for the official or a member of his or her immediate family which is
18 different from salaries paid to other employees of the government agency in the same job
19 classification or position, or when the member of the public official's immediate family is the only
20 person in the job classification or position.

21 (c) Notwithstanding subsection (b), pursuant to Government Code Section 82030(b)(2)
22 and California Code of Regulations, Title 2, section 18232, a public official may make, participate
23 in making, or use his/her official position to influence or attempt to influence, a government
24 decision under the following circumstances where all of the following conditions are satisfied:

25 (1) The decision is on his/her appointment as an officer of the body of which he/she is
26 a member (e.g. mayor or deputy mayor), or to a committee, board, or commission of a public
27 agency, a special district, a joint powers agency or authority, a joint powers insurance agency or
28 authority, or a metropolitan planning organization.

1 (2) ~~The position appointment is one required where to be made by the body of which~~
2 ~~the official is a member pursuant to state or local law. the official is appointed by order of the~~
3 ~~appointing body, by ordinance or resolution of the appointing body, or pursuant to state law.~~

4 (3) The body making the appointment referred to in paragraph (1) adopts and posts on
5 its website, on a form provided by the Commission, a list that sets forth each appointed position
6 for which compensation is paid, the salary or stipend for each appointed position, the name of the
7 public official who has been appointed to the position and the name of the public official, if any,
8 who has been appointed as an alternate, and the term of the position.

9 Comment: Cross-references: For the definition of “immediate family” see Government
10 Code section 82029.

11 Note: Authority cited: Section 83112, Government Code. Reference: Sections 87100, 87102.5,
12 87102.6, 87102.8 and 87103, Government Code.

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