

# THE MCMILLAN LAW FIRM

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March 15, 2012

## Via Facsimile & First Class Mail

Fair Political Practice Commission  
Zachery P. Morazzini, General Counsel  
428 J Street, Suite 620  
Sacramento, CA 95814-2329

Re: Support of Petition to Amend Regulation 18705.5, and in opposition to the letter of A. Aiko Yamakawa, of the law firm of Procopio, Cory, Hargreaves and Savitch, LLP.

Dear Mr. Morazzinni:

I submit this letter as comment on the proposed amendment to California Code of Regulations, title 2, section 18705.5 ("Regulation 18705.5) as submitted by Ash Pirayou of Rutan and Tucker and identified on the March 15, 2012 meeting agenda for the California Fair Political Practices Commission ("FPPC"). Our office serves as legal counsel to various political activists, some elected and others not. One of those activists we represent is Kathleen Sterling.

In part we submit this comment to address the comments of lawyer A. Aiko Yamakawa, of the law firm of Procopio, Cory, Hargreaves and Savitch, LLP. Ms. Yamakawa's firm presently represents Tri-City Healthcare District, which operates the Tri-City Medical Center (TCHD). Kathleen Sterling is a member of the board of directors of TCHD. She was elected to her third term by the constituents in that District, and has served on the board for more than a decade.

By way of background, Ms. Yamakawa's firm represented TCHD in connection with two lawsuits against my client Kathleen Sterling. I represent Director Sterling in her defense of those the two TCHD lawsuits. The first lawsuit involved TCHD's unsubstantiated request for eight (8) restraining orders to prevent workplace violence, brought according to Code of Civil Procedure section 527.8, in a consolidated case entitled *Tri City Healthcare District v. Kathleen Sterling*, filed in the Superior Court of California, for the County of San Diego, Case No. 2011-00052069. The Procopio firm represented TCHD at the trial.

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After four days of trial, the Court found that the claims of TCHD did not merit relief, and entered judgment against TCHD on all eight petitions. Ms. Yamakawa's colleagues were very upset by the ruling and vowed further efforts against Director Sterling. Indeed, Director Reno, the leader of the faction of the board presently controlling TCHD even, outlandishly, proclaimed that the trial judge had been **bribed**.

TCHD and Procopio's legal machinations did not end with the restraining order efforts. Ms. Yamakawa's firm has made appearances on behalf of TCHD in another civil suit, e.g., *Tri City Healthcare District v. Kathleen Sterling*, Superior Court of California, for the County of San Diego, Case No. 2011-00052050. i.e., in which among other things, TCHD accused Director Sterling of "Injury to Business Reputation and Dilution". That claim, in the abstract, sounds serious. But, a few searches on the Youtube.com website and a review of the videos posted of that organization's board meeting will reveal the comedy of any suggestion that TCHD's business reputation could be injured.<sup>1</sup> The Superior Court determined that claim TCHD brought, among others, was a "Strategic Lawsuit Against Public Participation," and struck it according to Code of Civil Procedure section 425.16. The remainder of the civil case is stayed pending Tri-City's appeal of the restraining order cases.

But, germane to this inquiry: Ms. Yamakawa's firm successfully lobbied the San Diego County District Attorney's office to initiate prosecution against my client Kathleen Sterling in *People v. Kathleen Sterling*, Superior Court of California, County of San Diego Case No. CN 284943. The People brought charges of Bribery, e.g., Penal Code section 86, against Director Sterling, which were **dismissed** at the preliminary hearing. The only remaining charge against Director Sterling is brought according to Government Code section 87100, a misdemeanor. That remaining charge is based upon a tortured, and improbable interpretation of the regulations of the Fair Political Practices Commission.

Director Sterling, is a conscientious, civic-minded activist. She has been elected by her constituents to serve on a board that controls the operation of an agency that has nearly a one Billion dollar budget. Her efforts to monitor the operation of the agency have been derailed, as she is pursued over a misdemeanor charge arising from a vote on a committee appointment with a stipend of some \$100 per meeting. Meanwhile, contractors friendly with Procopio, dominant board members of TCHD, and its executive Larry B. Anderson, have received lucrative contracts worth millions of dollars without proper oversight.

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<sup>1</sup> "Tina Jillings calls out Tri City Medical Center Board of Director Rose Marie Reno." <http://www.youtube.com/watch?v=axPknhw3oH4>. The attorney participating in the meeting, depicted in the video, is a colleague of Ms. Yamakawa at the Procopio law firm.

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In sum, the seemingly artful and articulate presentation by Procopio's Ms. Yamakawa must be read in the context of her Firm's representation of the TCHD board and its leader Larry B. Anderson, and a use of Government Code section 87100 that the Legislature could not have intended.

Ms. Yamakawa's suggestions must be considered in light of what have already been determined to be unjust efforts to stifle Kathleen Sterling's speech.

The present wording of the FFPC regulations lead to absurdities and abuse. Unfortunately, there will always be lawyers that will capitalize on ambiguities. Regulations should be written in a manner that do not lead to unintended consequences or lend to abuse. The suggested change in the language proposed by Ash Pirayou of Rutan and Tucker should be adopted. The addition to that language suggested by A. Aiko Yamakawa and the Procopio group should be rejected for what it is: sabotage of a reform by inserting further ambiguity.

Very truly yours,



Scott A. McMillan



## Prosecution for Tri-City vote is unusual

**Other elected officials have opposed sanctions against themselves without charges**

By Aaron Burgin

Wednesday, September 14, 2011



Oceanside — Kathleen Sterling opposed her own censure on the Tri-City Healthcare District board, and in doing so, she voted to preserve the \$100-per-meeting stipends that were taken from her as a penalty.

That conflict of interest has resulted in a criminal prosecution of Sterling for an act that has not resulted in charges against other elected officials in the region. The matter comes up on Friday, when a judge will hear Sterling's motion to dismiss the case.

Sterling's vote happened in August 2010, when she opposed penalties imposed by her colleagues, who said she was hostile toward hospital staff and disrupted meetings.

In court, she is now charged with violating a law that bars elected officials from participating in votes in which they have a financial interest, a misdemeanor that carries a possible jail sentence.

At least two elected officials since 2000 have cast similar votes without facing charges.

In 2001, Lemon Grove Councilman Craig Lake voted against being taken off the Heartland Fire board, which carried a small stipend. His colleagues accused him of misuse of city code enforcement to benefit himself in a real estate deal.

In 2009, Poway Councilwoman Betty Rexford voted against the council's move to replace her on committee posts in response to allegations that she abused her city powers in a neighbor dispute. Losing the posts cost her \$4,800 in annual income.

District Attorney's spokesman Steve Walker could not say if Lake or Rexford were investigated for their votes, citing the office's policy of never confirming the existence of a public integrity investigation. The state Fair Political Practices Commission, which could fine or issue warnings to elected officials on such issues, said it did not investigate either official.

Officials involved with both cases said they did not remember anyone investigating the votes.

"There was no DA, no attorney general and no FPPC involved," said Lemon Grove Mayor Mary Sessom, who initiated the action against Lake. "I am surprised that he was allowed to vote, but if I thought it was OK and our city attorney did, I don't know why he would have been investigated."

Poway officials recall numerous agencies investigating Rexford, but not for her vote on committee assignments.

Sterling is being prosecuted using the "undue influence" statute, Government Code 87100. Other than Sterling, two elected officials since 2000 have been charged under that statute by the District Attorney's Office, Walker said.

One was former Encinitas Mayor Dan Dalager, who pleaded guilty earlier this year to accepting steeply discounted kitchen appliances from a local store owner and then voting in the store owner's favor in a dispute with the city over a rock wall at his home.

Walker would not identify the other.

One political expert was puzzled by use of the charge against Sterling.

"It would be like going after council members for voting on their own salary increases," said Max Neiman, a senior fellow at the UC Berkeley Institute for Governmental Studies. "I could see how it could be considered a violation of the law, but it doesn't seem like something that should be prosecuted, particularly at a time when district attorneys' resources are very scarce."

The District Attorney's Office prosecuted Sterling after the state Fair Political Practices Commission referred a complaint filed by Tri-City to them. The Public Defender's Office, which is representing Sterling, declined to comment, as did Sterling.

Some government attorneys have advised elected officials not to vote on a nomination that reaps them a stipend, after a 2003 FPPC advice letter concluded that it would be a conflict of interest. Such votes, however, do occur.

Carlsbad City Council members, for example, vote on their appointments to regional boards, City Attorney Ron Ball said. He said he considers the 2003 advice letter to be just that — advice.

In January, the council unanimously approved its representatives to a number of regional panels.

As an example, Mayor Matt Hall voted with the council to appoint himself to the board and two committees for the San Diego Association of Governments. The position pays \$150 per meeting, for a maximum of \$900 per month.

Hall said voting on his own appointments makes sense, as he knows his own qualifications. He noted the city is not contentious like some other elected bodies, but he added, "I'm going to need to lean on Ron Ball for his advice on what we should be doing."

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## State reviews conflict-of-interest rules

### Watchdog panel addresses an issue in play with local agencies

By Aaron Burgin

Thursday, November 24, 2011

The state Fair Political Practices Commission is considering changing its stance on whether elected officials should vote on their own appointments to stipend-paying boards and commissions.

That issue is central to the case involving Tri-City Healthcare District board member Kathleen Sterling, who is being prosecuted criminally for voting against being stripped of her \$100-a-meeting stipend.

The commission's deliberations are also being closely watched in Carlsbad, where the city council has a longstanding practice of voting unanimously on board appointments.

The FPPC currently says that elected officials should not vote on their appointment to boards that pay members stipends of more than \$250 annually because it is a financial conflict of interest. Two city attorneys in Orange County in November sent letters to the FPPC urging the agency to reverse its opinion after a citizen filed a complaint with the commission against a municipal official for such a vote.

FPPC Chairwoman Ann Ravel said that the state's political watchdog agency is discussing the issue because of Orange County complaint.

"It is the subject of internal discussion," Ravel said. "I think it is a matter that we will scrutinize and potentially revisit."

Sterling is facing misdemeanor charges of violating the state's conflict-of-interest laws for voting in August 2010 against her own censure that, among other things, stripped her of her \$100 stipend for attending board meetings. The Watchdog in September found that the charges Sterling faces are rare and that other elected officials had cast similar votes without being criminally prosecuted.

Sterling's trial is scheduled for January.

Bob Stern, the co-author of the state's Political Reform Act of 1974 and the FPPC's first general counsel, said he personally believes that elected officials should not vote on their appointments to boards.

However, he said, if the FPPC drops its objection to elected officials voting for their appointment to stipend-bearing boards, impact Sterling's case.

"The prosecution doesn't have to agree with the FPPC, but it certainly doesn't help their case," Stern said.

The District Attorney's office declined comment through spokesman Steve Walker. Tri-City officials also declined comment.

The FPPC has written several advice letters since 2003 that widened its interpretation of conflict-of-interest laws to include stipends that government boards pay to appointed members. The commission cites a state regulation that bars elected officials from participating in a vote that would raise their income at least \$250 more than other employees or officials in the same position.

The Orange County complaint was filed in October against an official who voted on his appointment to a board that paid \$212.50 per meeting. The name of the official and city are redacted from the complaint.

The Orange County attorneys contend the FPPC's interpretation supersedes a state law that says government income is exempt from conflict laws. They also argue that the FPPC itself has not been clear on whether the practice constitutes a conflict, citing multiple advice letters from the agency that the attorneys say contradict each other.

"The fact that the Commission has issued so many advice letters in direct conflict with each other and the statute, the prosecution of any complaints filed against our clients would seem to be nearly impossible given the substantial ambiguity caused by the Commission's regulations and advice letters," wrote Ash Pirayou, whose firm Rutan and Tucker represents several cities including Anaheim, Irvine and Newport Beach.

Stern said that even if the FPPC doesn't change its position, the commission's conflicting letters on the topic could work in Sterling's favor.

"Any ambiguity always helps the defendant," he said.

A change by the FPPC could clarify things in Carlsbad. For years, council members there have voted on their own appointments to a number of regional panels. As an example, Mayor Matt Hall voted with the council to appoint himself to the board and two committees for the San Diego Association of Governments. The position pays \$150 per meeting, for a maximum of \$900 per month.

Carlsbad City Attorney Ron Ball said the city has followed the state law, which exempts government salaries from the conflict laws. He also said FPPC letters have been conflicting. He added that two relatively easy ways to resolve the matter is for the FPPC or the state Attorney General to issue clear opinions.

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SOUTHERN CALIFORNIA -- THIS JUST IN

### Audit: Hospital district leaders had financial ties to contractors

March 8, 2012 | 6:21pm

A Monterey County public hospital district paid \$21 million over the last five years to firms in which its chief executive and board members held financial interests, according to a state audit released Thursday.

The audit was launched in response to a series of articles in The Times last year that highlighted the huge supplemental pension and severance received by hospital's former chief executive, which totaled nearly \$5 million.

The audit found that the Salinas Valley Memorial Healthcare System regularly did business with firms that the board and top officials had financial stakes in — in some cases in apparent violation of state conflict-of-interest laws.

The report stated that Salinas Valley lacks sufficient safeguards against making decisions that violate conflict-of-interest laws, and that the district therefore can't guarantee "that its board members and executives do not experience personal financial gain from its transactions with businesses."

The audit found 11 instances between 2006 and 2010 in which board members had reported economic ties -- including stocks, salaries and other types of payments -- to vendors in which the district did business.

Not all the cases represented violations of conflict-of-interest rules, state auditors said, but in two cases they found officials may have broken the law.

One case involved former CEO Samuel Downing, who had \$50,000 in investments with 1st Capital Bank, an institution Salinas Valley and the executive agreed to deposit \$1 million into.

In another case, the hospital made \$5.6 million in disbursements to financial services provider Rabobank, where a board member, Harry Wardwell, serves as a regional president and receives a salary of more than \$100,000, according to his most recent statement of economic interest.

State auditors referred both cases to the Monterey County district attorney's office for further investigation.

Officials also recommended that Salinas Valley have an independent investigator review the hospital's business relationships with companies with economic ties to board members and executives.

"This sheds light on some of the most egregious fiscal practices I've ever seen, and which were certainly the norm at the hospital for many years," said Assemblyman Luis Alejo (D-Watsonville), who called for the audit.

Wardwell also has served as executive director of the California International Airshow, to which the hospital has given more than \$100,000 in recent years.

Hospital officials said they would implement recommendations made by the state auditors.

The hospital already has discontinued the controversial, supplemental retirement plan, according to spokeswoman Adrienne Laurent.

And, in their response to the auditor's report, board members said they would take steps to update policies on executive compensation, contracting decisions and community grants.

But the hospital strongly defended specific contracting decisions that the auditors called into question.

"The audit report irresponsibly alleges serious violations of conflict-of-interest rules without conducting a thorough consideration of the laws and how they might apply," the board members wrote in a response to the state's findings.

In the case of the board member who worked at Rabobank, the hospital insisted he had "at most....a remote" interest in the deal, making him exempt from conflict-of-interest laws.

And when Downing signed off on the 2008 agreement with a bank he held stock in, the district said he was simply carrying out "ministerial duties delegated to him."

The hospital district also criticized auditors listing for nine other cases in which it paid money to entities with which its board or executives had a financial interest, saying there was no evidence of impropriety in those instances.

John Borsos, a vice president for the National Union of Healthcare Workers, which represents many of the hospital's employees, called the audit "just a scathing report" and a validation of concerns going back the better part of two years.

#### ALSO:

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-- Sam Allen and Hector Becerra

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