



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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To: Chair Remke, Commissioners Audero, Casher, Wasserman, and Wynne

From: Hyla Wagner, General Counsel
John Wallace, Assistant General Counsel
Heather Rowan, Senior Commission Counsel

Subject: Legal Division's Monthly Report

Date: January 8, 2016

A. Pending Litigation

Frank J. Burgess v. Fair Political Practices Commission.

Frank J. Burgess filed a writ of mandate in Riverside Superior Court on October 4, 2015, seeking relief from the Commission's decision and order in *In re Frank J. Burgess*, Case No. 12/516. Following an administrative hearing in front of an Administrative Law Judge (ALJ), Mr. Burgess challenged that decision to the Commission. After oral argument before the Commission on March 19, 2015 and a thorough review of the record, the Commission rejected the ALJ's decision and decided the case based on the record, oral argument, and the parties' supplemental briefing on the "governmental decision" element of the case. The Commission found that Mr. Burgess violated Government Code Section 87100 and imposed a \$5,000 fine on July 7, 2015. Mr. Burgess challenges that decision as an excess of the Commission's jurisdiction, an abuse of discretion, and a denial of due process rights. Petitioner must amend his petition, if at all, by December 31st. As of this writing, we have not been served with an amended petition. The court will hold a status conference on January 20, 2016.

B. Outreach and Training

On December 4, 2015, Senior Commission Counsel Heather M. Rowan participated in a panel for the County Counsel's Association of California. Ms. Rowan discussed the Commission's new jurisdiction over Government Code Section 1090, that code's application, and answered many questions from the 80+ county counsel participants.

On December 8, 2015, General Counsel Hyla Wagner participated in a panel on SuperPACs, discussing the FPPC's recently revised independent expenditure coordination rules, at the Council on Governmental Ethics Laws' (COGEL) annual meeting. Also on the panel was former FEC Commissioner Trevor Potter.

Senior Commission Counsel Sukhi K. Brar participated in an Ethics Roundtable hosted by Assemblymembers Susan Eggman and Christina Garcia in Stockton on December 10, 2015. Ms. Brar educated local elected and appointed officials on the rules that apply to them under the Political Reform Act and under Government Code Section 1090. Ms. Brar also led an interactive group discussion on these issues with the participants using hypothetical situations.

C. Probable Cause Decisions

- * Please note that a finding of probable cause does not constitute a finding that a violation has actually occurred. The respondents are presumed to be innocent of any violation of the Political Reform Act (the Act)¹ unless a violation is proven in a subsequent proceeding.

There are two probable cause decisions:

1. *In the matter of Anthony A. “Tony” Strickland, Strickland for Controller 2010, Lysa Ray, Ventura County Republican Party, Arkady Milgram, Stanislaus Republican Central Committee (State Acct), and Gary McKinsey.*

On November 10, 2015, after hearing, probable cause was found to believe that the named Respondents committed violations of the Act, as follows:

Strickland, Strickland for Controller, and Ray

- Count 1: Contribution Made in the Name of Another. Strickland, Strickland for Controller, and Ray, in June 2010, purposefully or negligently caused, or aided and abetted, Templeton to make a contribution of \$30,750 (\$32,400 minus VCRP’s 5% fee) to Strickland for Controller in the name of VCRP, violating Section 84301.
- Count 2: Contribution Made in the Name of Another. Strickland, Strickland for Controller, and Ray, in June 2010, purposefully or negligently caused, or aided and abetted, Barth to make a contribution of \$14,250 (\$15,000 minus VCRP’s 5% fee) to Strickland for Controller in the name of VCRP, violating Section 84301.
- Count 3: Contribution Made in the Name of Another. Strickland, Strickland for Controller, and Ray, in October 2010, purposefully or negligently caused, or aided and abetted, Templeton to make a contribution of \$15,000 to Strickland for Controller in the name of SCRP, violating Section 84301.

¹ The Act is contained in Government Code sections 81000 through 91014, and all further statutory references are to this 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 this source.

- Count 4: Contribution Made in the Name of Another. Strickland, Strickland for Controller, and Ray, in October 2010, purposefully or negligently caused, or aided and abetted, Swanson to make a contribution of \$5,000 to Strickland for Controller in the name of SCRCP, violating Section 84301.
- Count 5: Prohibited Earmarked Contribution. Strickland, Strickland for Controller, and Ray, in June 2010, purposefully or negligently caused, or aided and abetted, Templeton to make a contribution to VCRP on the condition or with the agreement that the contribution would be ultimately contributed to Strickland for Controller, and the intermediary and original contributor information for the earmarked contribution were not disclosed, violating Section 85704.
- Count 6: Prohibited Earmarked Contribution. Strickland, Strickland for Controller, and Ray, in June 2010, purposefully or negligently caused, or aided and abetted, Barth to make a contribution to VCRP on the condition or with the agreement that the contribution would be ultimately contributed to Strickland for Controller, and the intermediary and original contributor information for the earmarked contribution were not disclosed, violating Section 85704.
- Count 7: Prohibited Earmarked Contribution. Strickland, Strickland for Controller, and Ray, in October 2010, purposefully or negligently caused, or aided and abetted, Templeton to make a contribution to SCRCP on the condition or with the agreement that the contribution would be ultimately contributed to Strickland for Controller, and the intermediary and original contributor information for the earmarked contribution were not disclosed, violating Section 85704.
- Count 8: Prohibited Earmarked Contribution. Strickland, Strickland for Controller, and Ray, in October 2010, purposefully or negligently caused, or aided and abetted, Swanson to make a contribution to SCRCP on the condition or with the agreement that the contribution would be ultimately contributed to Strickland for Controller, and the intermediary and original contributor information for the earmarked contribution were not disclosed, violating Section 85704.
- Count 9: Accepting an Over-the-Limit Contribution. Strickland, Strickland for Controller, and Ray, in June 2010, accepted an over-the-limit contribution from Templeton totaling \$30,750 (\$32,400 minus VCRP's 5% fee), violating Section 85301 and Regulation 18545(a)(1).
- Count 10: Accepting an Over-the-Limit Contribution. Strickland, Strickland for Controller, and Ray, in June 2010, accepted an over-the-limit contribution from Barth totaling \$14,250 (\$15,000 minus VCRP's 5% fee), violating Section 85301 and Regulation 18545(a)(1).

- Count 11: Accepting an Over-the-Limit Contribution. Strickland, Strickland for Controller, and Ray, in October 2010, accepted an over-the-limit contribution from Templeton totaling \$15,000, violating Section 85301 and Regulation 18545(a)(1).
- Count 12: Accepting an Over-the-Limit Contribution. Strickland, Strickland for Controller, and Ray, in October 2010, accepted an over-the-limit contribution from Swanson totaling \$5,000, violating Section 85301 and Regulation 18545(a)(1).
- Count 13: Disclosure of False Information in Campaign Statements. Strickland, Strickland for Controller, and Ray, on or about July 22, 2010, filed a false campaign statement for the reporting period of May 23 through June 30, 2010, concealing the violations described in Counts 1, 5 and 9 by falsely reporting that Strickland for Controller received a contribution from VCRP, when the contribution was made by Templeton, and VCRP was the intermediary for the transaction, violating Section 84211(f).
- Count 14: Disclosure of False Information in Campaign Statements. Strickland, Strickland for Controller, and Ray, on or about July 22, 2010, filed a false campaign statement for the reporting period of May 23 through June 30, 2010, concealing the violations described in Counts 2, 6 and 10 by falsely reporting that Strickland for Controller received a contribution from VCRP, when the contribution was made by Barth, and VCRP was the intermediary for the transaction, violating Section 84211(f).
- Count 15: Disclosure of False Information in Campaign Statements. Strickland, Strickland for Controller, and Ray, on or about January 21, 2011, filed a false campaign statement for the reporting period of October 17 through December 31, 2010, concealing the violations described in Counts 3, 7 and 11 by falsely reporting that Strickland for Controller received a contribution from SCRCP, when the contribution was made by Templeton, and SCRCP was the intermediary for the transaction, violating Section 84211(f).
- Count 16: Disclosure of False Information in Campaign Statements. Strickland, Strickland for Controller, and Ray, on or about January 21, 2011, filed a false campaign statement for the reporting period of October 17 through December 31, 2010, concealing the violations described in Counts 4, 8 and 12 by falsely reporting that Strickland for Controller received a contribution from SCRCP, when the contribution was made by Swanson, and SCRCP was the intermediary for the transaction, violating Section 84211(f).

VCRP and Milgram

- Count 17: Failure to Disclose Intermediary and Original Contributor Information. VCRP and Milgram, in June 2010, while acting as the intermediary for Templeton, failed to disclose both the intermediary and the original contributor information for a \$30,750

(\$32,400 minus VCRP's 5% fee) contribution from Templeton to Strickland for Controller, violating Section 84302.

- Count 18: Failure to Disclose Intermediary and Original Contributor Information. VCRP and Milgram, in June 2010, while acting as the intermediary of Barth, failed to disclose both the intermediary and the original contributor information for a \$14,250 (\$15,000 minus VCRP's 5% fee) contribution from Barth to Strickland for Controller, violating Section 84302.
- Count 19: Disclosure of False Information in Campaign Statements. VCRP and Milgram, on or about July 27, 2010, filed a false campaign statement for the reporting period of June 6 through June 30, 2010, concealing the violations described in Counts 1, 2, 5, 6, 9, and 10, by falsely reporting that VCRP made a \$45,000 contribution to Strickland for Controller, when it was not the true source of the contributions and was the intermediary for the transactions, violating Section 84211(k).

SCRP and McKinsey

- Count 20: Failure to Disclose Intermediary and Original Contributor Information. SCRCP and McKinsey, in October 2010, while acting as the intermediary for Templeton, failed to disclose both the intermediary and the original contributor information for a \$15,000 contribution from Templeton to Strickland for Controller, violating Section 84302.
- Count 21: Failure to Disclose Intermediary and Original Contributor Information. SCRCP and McKinsey, in October 2010, while acting as the intermediary for Swanson, failed to disclose both the intermediary and the original contributor information for a \$5,000 contribution from Templeton to Strickland for Controller, violating Section 84302.
- Count 22: Disclosure of False Information in Campaign Statements. SCRCP and McKinsey, on or about December 1, 2010, filed a false campaign statement for the reporting period of October 17 through November 20, 2010, concealing the violations described in Counts 3, 4, 7, 8, 11 and 12 by falsely reporting that SCRCP made a \$20,000 contribution to Strickland for Controller, when it was not the true source of the contribution and was the intermediary for the transaction, violating Section 84211(k).

2. *In the Matter of Shelly Garza for City Council District 5-2012, Aracely "Shelly" Garza, and Kathy Kyllonen.*

This matter was decided based solely on the papers. The respondents did not request a probable cause hearing or appear. Probable cause was found to believe Respondents committed the following violations of the Act:

- Count 1: Garza, Kyllonen, and the Committee (hereinafter Respondents) failed to file a semiannual campaign statement for the period of October 21, 2012 to December 31, 2012, in violation of Section 84200(a).
- Count 2: Respondents failed to file a semiannual campaign statement for the period of January 1, 2013 to June 30, 2013, in violation of Section 84200(a).
- Count 3: Respondents failed to file a semiannual campaign statement for the period of July 1, 2013 to December 31, 2013, in violation of Section 84200(a).
- Count 4: Respondents failed to file a semiannual campaign statement for the period of January 1, 2014 to June 30, 2014, in violation of Section 84200(a).
- Count 5: Respondents failed to file a semiannual campaign statement for the period of July 1, 2014 to December 31, 2014, in violation of Section 84200(a).

D. Legal Advice

In December 2015, the Legal Division attorneys responded to the following requests for legal advice:

- ***Email Requests for Advice:*** Responded to more than 69 email and telephone requests.
- ***Advice Letters:*** Received 12 advice letter requests and issued 7 advice letters.
- ***Section 1090 Letters:*** Received 4 advice letter requests concerning Section 1090 and issued 5 advice letters (one additional letter was withdrawn). In 2015, we received 58 requests regarding Section 1090 (not including conflict of interest letters that incidentally deal with Section 1090 issues).

E. Advice Letter Summaries

Conflict of Interest

Thomas B. Brown

I-15-179

Councilmember, who is also the Co-President of a boutique hospitality advisory firm, is not prohibited from taking part in decisions limited to enhancing taxation authority by becoming a charter city, imposing a real property transfer tax, or increasing the city's sales tax. He is disqualified, however, from decisions such as increasing the city's occupancy tax, promoting new hotel development, and expanding existing hotel entitlements because of the nexus between the decisions and the income received as the Co-President of the firm. To the extent that the decisions will be considered as a package, the councilmember is disqualified from taking part in decisions involving the package unless the decisions are segmented. Additionally, the councilmember is not

prohibited from taking part in the decisions regarding specific developments merely because the projects may include a hotel.

Joan A. Borger**A-15-226**

A city councilmember may participate in decisions related to timing and phasing of construction of a town center project so long as these decisions do not have a foreseeable material financial effect on his financial interests, and so long as they do not reopen, determine, affirm, nullify, or alter the previous decisions approving the downtown specific plan or any other decision from which he may be disqualified. Construction financing, extension of time frames, and possibly ownership structure of the housing units are decisions “inextricably interrelated” to the downtown specific plan to the extent that they reopen, determine, affirm, nullify, or alter these previous decisions.

William T. Peake**A-15-227**

The councilmember will have a conflict of interest in decisions that uniquely affect coastal areas near his properties. Other decisions may be segmented if the decision in which the official has a financial interest can be broken down into separate decisions that are not inextricably interrelated to the decision in which the official has a disqualifying financial interest and: (1) the decision in which the official has a financial interest is segmented from the other decisions; (2) the decision in which the official has a financial interest is considered first and a final decision is reached by the agency without the disqualified official’s participation in any way; and (3) segmented decisions do not result in a reopening of, or otherwise financially affect, the decision from which the official was disqualified.

Bill Horn**A-15-185(a)**

The supervisor requested reconsideration of prior written advice based on new facts. The response confirmed that under the Act a county supervisor who owns 36.8 acres of property 1.3 miles away from a major housing development project has a conflict of interest in decisions involving the project because the decisions will have a reasonably foreseeable material financial effect on the official’s real property interest.

SEI**Dan Miller****I-15-214**

The County of Marin may share its e-file system for statements of economic interests (Form 700) with 11 cities in the county so that these other cities may use the system for their Form 700 filers so long as (1) each city clerk performs all the required duties of the filing official; and (2) there are no supplemental schedules or other differences between the information requested by Marin County in connection with its Form 700 filings and that requested by the 11 cities.

Section 1090**Jon Ansolabehere****A-15-180**

A planning commissioner whose spouse works for and receives income from a consulting firm that is seeking to obtain a contract with the city is prohibited from participating in city decisions

regarding that contract because of the financial effect upon his economic interest in his spouse's consulting firm. However, Section 1090 does not create a conflict for the commissioner.

Matthew E. Richardson **A-15-212**

Section 1090 applies to potential contracts between the City of Gardena and the Lake Forest Community Association homeowners association (HOA) relating to disputes between the city and the HOA because a city councilmember who is a member of the HOA would be financially interested in those contracts. The disputes between the city and the HOA involve a recreational lake owned by the HOA and a pond that the HOA is contractually obligated to maintain. Under Section 1090's rule of necessity, the city council may enter into these potential contracts, but the councilmember must abstain from making or participating in the making of them, including any negotiations or discussions regarding the disputes.

Thomas T. Watson **A-15-222**

A councilmember and owner of a vacation home rental business may participate in the city council decision to award a contract to study the impact of vacation home rentals in the area pursuant to 1090 and the Act.

Blaise J. Jackson **A-14-223**

Section 1090 does not preclude a healthcare district from providing a grant to a fire protection district, despite the fact that a board member is also the chief of the fire protection district, so long as (1) the board member discloses his interest in the grant to the public agency, (2) the interest is noted in the agency's official records, and (3) the board member abstains from any participation in the making or approval of the grant. Additionally, the board member does not have a potentially disqualifying interest in the fire protection district, another government agency, resulting from any income received from the agency under the Act. To the extent there may be a foreseeable material financial effect on any other interest he may have, the Act only precludes the board member from making, participating in making, or using his position to influence the decision. The Act does not preclude the Fallbrook Healthcare District from providing the grant.

Steven D. Miller **A-15-229**

Section 1090 does not preclude a district from renewing a commercial activity permit for a district board member because the permit is a business license that is regulatory in nature and not a contract. However, the board member may not take part in the decision under the conflict-of-interest provisions of the Act and must avail himself of the same procedure available to the public in submitting his application for renewal.

F. Upcoming Regulations

The proposed regulations schedule for the upcoming three months is set forth below, subject to modification.

February 18, 2016

- **2015 Legislation Implementation Package.** Regulatory Changes necessitated by Legislation enacted in 2015.

March 17, 2016

- **Lobbyist Definition (Regulation 18239).** Amend the definition of “direct communication” to clarify that the “ride along exception” does not apply to *any* person who meets or speaks with a qualifying official in the company of a registered lobbyist, but applies only in limited, specific circumstances.

April 21, 2016

- **Conflict of Interest Code Processes (Regulations 18750 et. seq.)** Streamline the process for conflict of interest code approval to rely more on agency determinations and simplify code approval regulations.