

California Fair Political Practices Commission

MEMORANDUM

To: Chair Ravel, Commissioners Eskovitz, Garrett, Montgomery and Rotunda

From: Zackery P. Morazzini, General Counsel
Sukhi K. Brar, Commission Counsel

Re: Consideration of Petition to Amend 18705.5

Date: December 3, 2012

I. Introduction

This petition to amend Regulation 18705.5 was submitted by Adam D. Link of Somach Simmons & Dunn on behalf of the California Association of Sanitation Agencies (“CASA”) pursuant to Section 11426 of the 1974 Administrative Procedures Act, which provides that any interested person may petition a state agency requesting the adoption, amendment, or repeal of a regulation.

II. Background

Regulation 18705.5(c), which according to the regulatory reference, interprets and clarifies Sections 87100, 87102.5, 87102.6, 87102.8 and 87103 of the Act¹ currently provides:

“(c) Notwithstanding subsection (b), pursuant to Section 82030(b)(2) and Regulation 18232, a public official may make, participate in making, or use his or her official position to influence or attempt to influence, a government decision where all of the following conditions are satisfied:

- (1) The decision is on his or her appointment as an officer of the body of which he or she is a member (e.g., mayor or deputy mayor), or to a committee, board, or commission of a public agency, a special district, a joint powers agency or authority, a joint powers insurance agency or authority, or a metropolitan planning organization.
- (2) The appointment is one required to be made by the body of which the official is a member pursuant to either state law, local law, or a joint powers agreement.

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.

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

Thus, Regulation 18705.5 currently allows a public official to participate in a governmental decision to appoint himself or herself to a position in which the public official will become an officer of the body to which the public official already belongs or to an outside committee, board or commission of a public agency, a special district, a joint powers agency or authority, a joint powers insurance agency or authority, or a metropolitan planning organization when that appointment is required by law or a joint powers agreement. The FPPC’s advice has been that if the appointment is not required by law or joint powers agreement then a public official may not participate in the decision for their own appointment when they will be paid \$250 or more in a 12-month period as a result of the appointment.

Petitioner CASA represents over 120 local government agencies and special districts that provide wastewater collection, treatment, and water recycling services to millions of Californians. These local government agencies and special districts have boards and those boards in turn establish ad hoc and standing committees. Appointments to ad hoc and standing committee positions often pay appointees \$250 or more in a 12-month period.

Petitioners seek to add an exception to Regulation 18705.5 that will provide public officials the ability to participate in decisions to appoint themselves to standing committees and ad hoc committees of the public official’s own agency, even when such appointments are not specifically required by law.

III. Analysis of the Proposal

This petition for amendment to Regulation 18705.5 stems from previous amendments to the Regulation that took place earlier this year in March. Prior to the March amendments, Regulation 18705.5 did not permit public officials to participate in decisions to appoint themselves to any positions that would provide them with income of \$250 or more in a 12-month period because that was considered to be a conflict of interest. The March amendments now allow public officials to participate in decisions concerning their own appointments to positions as officers of the bodies of which they are members, or to outside committees, boards or commissions of public agencies, special districts, joint powers agencies or authorities, joint powers insurance agencies or authorities, or metropolitan planning organizations if the appointments are required to be made by either state law, local law or a joint powers agreement and are required to be made by the bodies on which the officials are members. As a safeguard, the bodies making such appointments are now required to adopt and post on their websites a form that lists each appointed position, the name of the public official appointed to each position (including alternates) and the salary or stipend paid for the appointed position.

The Petitioners emphasize the following arguments in support of the proposal:

1. Petitioners believe that in light of the amendments to Regulation 18705.5 earlier this year, there is little difference between allowing public officials to participate in decisions to appoint themselves to positions as required by law and allowing public officials to participate in appointments made to internal standing committees or ad hoc committees of their own agencies when there is no specific law requiring them.

Staff believes that the public would be protected from any potential abuse of such appointments because the agency would have the same online reporting requirements. Therefore, when public officials participate in decisions to appoint themselves these actions would be disclosed online for the public to see.

2. Petitioners explain that having to pass an ordinance or law every time an appointment to a standing committee or ad hoc committee is needed would be costly and time consuming.

Staff agrees that the process for adopting a new law can be time consuming and costly. Depending on the type of local jurisdiction, there must be a notice period for a new law (typically 2 months), the law must be vetted and written by staff and attorneys, and agencies must pay to have the draft language published in the newspaper.

3. Many of Petitioner's member agencies are concerned that they will not be able to adequately and appropriately staff standing and ad hoc committees without a change in the Regulation because recusal by public officials could result in lack of a quorum.

Staff agrees. Moreover, if adopted, this amendment would also allow the public officials to openly debate their individual qualifications for the appointed position, resulting in more information to the public.

4. Petitioners address concerns that the requested amendment could create an increase in the available compensation for public officials by stating that many of their member agencies prevent public officials from being compensated for more than six meetings and cap the level of compensation for participation and attendance at such meetings.

Staff agrees that such prohibitions reduce the potential for abuse.

Conclusion and Staff Recommendation

Staff believes that the ultimate resolution of this issue is a policy decision for the Commission. Staff believes that as a regulatory agency we cannot be blind to the burdens placed on those citizens that accept the responsibility to govern, and the costs to agencies associated with additional procedural requirements with the state of today's economy. Thus, staff would recommend that if the Commission agrees, after hearing testimony, that the burden of compliance with the existing rule outweighs the potential for abuse given the public disclosure required, then the Commission should adopt the amendment presented by the Petitioners.

1 Amend 2 Cal. Code Regs. Section 18705.5 to read:

2 **§ 18705.5. Materiality Standard: Economic Interest in Personal Finances.**

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

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

19 (c) Notwithstanding subsection (b), pursuant to Section 82030(b)(2) and Regulation
20 18232, a public official may make, participate in making, or use his or her official position to
21 influence or attempt to influence, a government decision where all of the following conditions
22 are satisfied:

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

5 (2) The appointment is to a standing or ad hoc committee of the public agency of which
6 the public official is a member or one required to be made by the body of which the official is a
7 member pursuant to either state law, local law, or a joint powers agreement.

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

13 COMMENT: Cross-references: For the definition of “immediate family,” see Section 82029,
14 Government Code.

15 Note: Authority cited: Section 83112, Government Code. Reference: Sections 87100, 87102.5,
16 87102.6, 87102.8 and 87103, Government Code.

17
18
19
20
21
22
23