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FAIR POLITICAL PRACTICES COMMISSION
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To: Chair Remke, Commissioners Audero, Cardenas, Hatch, and Hayward
From: Jack Woodside, General Counsel, Zachary W. Norton, Senior Counsel
Subject: Commission Authority to Set Aside a Closure Letter
Date: May 7, 2018

Question

Does the Commission have the authority to set aside a closure letter? Specifically, may the Commission instruct the Enforcement Division to re-write all or part of a closure letter with language that the Commission approves, or otherwise rescind and issue it with that language?

Conclusion

Although the Administrative Procedures Act¹ does not expressly prohibit the Commission from instructing the Enforcement Division to revise a closure letter, there are due process concerns that preclude any decisions relating to the weighing of evidence, application of law to specific facts, or the determination of any legal right or duty in a specific case. In particular, there are procedural restrictions that the Commission must take into consideration before taking substantive action on any enforcement matter, including cases resolved with a closure letter.

First, the APA does not permit the Commission to make a decision regarding a matter that requires an evidentiary hearing. Thus, the Commission should not instruct the Enforcement Division to make a finding of guilt or innocence within a closure letter unless the respondent has stipulated to the facts and waived an evidentiary hearing.

Second, a respondent has the right to an unbiased decisionmaker. The APA provides for disqualification of a decisionmaker for bias, prejudice, or an interest in the preceding. Prejudice means that the decisionmaker has already decided a case before the hearing. To the extent that the Commission examines and reconsiders a closure letter, the Commission is likely disqualifying itself from acting as the decisionmaker if the Enforcement Division receives additional facts that would warrant reopening the same matter.

Finally, the APA requires state agencies to adopt some internal separation of functions, including limits on ex parte contacts as well as the internal separation of adjudicative functions from investigative, prosecutorial, and advocacy functions. Should the Commission examine and reconsider a closure letter, soliciting additional information from the Enforcement Division

¹ Provisions for administrative adjudication are set forth in Government Code Sections 11400-11529, hereinafter referred to as the APA. All further statutory references are to the Government Code.

would be impermissible ex parte communications if the respondent has not received notice of the preceding and the opportunity to participate in the communication.

If the Commission wishes to avoid disqualification in the event an investigation is reopened by the Enforcement Division upon the receipt of additional facts, the Commission should avoid examining and reconsidering specific closure letters. However, as a general regulatory matter, we note that the Commission may provide clearer rules as to the limits and scope of closure letters, including possible standardized language to be used in future closure letters.

Background

In enforcement matters, some cases resolve without the issuance of an administrative penalty. In those instances, the Enforcement Division will issue a letter to the person or persons complained about to conclude the case. There are three types of letters used.

1. **Warning Letters** – A Warning Letter is issued if a violation of the Act is found but the seriousness of the offense is low, public harm is minimal, and/or other mitigation is found so that a monetary fine is not warranted. Since no administrative penalty is imposed, these letters are issued by the Enforcement Division and do not require approval by the Commissioners.
2. **Advisory Letters** – If there is insufficient evidence to prosecute a case but the person complained about appears to need information about the Act to ensure future compliance, the Enforcement Division closes the case with an advisory letter.
3. **No Action Closure Letters** – If there is insufficient evidence to prosecute a case and no further information would be helpful or informative, the Enforcement Division issues a No Action Closure Letter to conclude the case.

Thus, a no action closure letter is not necessarily a finding of innocence or exoneration, but only a determination that insufficient evidence exists to prosecute.

Discussion

The Commission Cannot Make Finding of Guilt or Innocence Without Evidentiary Hearing for the Determination of Facts

To find a violation of the Political Reform Act (Act), Section 83116 requires a formal hearing in accordance with the APA. Under the APA, an evidentiary hearing, such as a formal hearing, for the determination of facts is required for the formation and issuance of a decision. (Section 11410.10.) A decision is an agency action of specific application that determines a legal right, duty, privilege, immunity or other legal interest of a particular person. (Section 11405.50.) Regulation 18327 requires a vote of at least three Commissioners to approve any formal action of the Commission, and notes that formal action includes the adoption of opinions, and “issuance of any decision, order or declaration pursuant to Section 83116.”

Generally, the Commission cannot make a decision such as a finding of guilt or innocence unless the Commission has conducted a formal hearing or the respondent has stipulated to facts and agreed to waive the formal hearing. Accordingly, if these foundational steps have not occurred, the Commission should not instruct the Enforcement Division to make a finding of innocence or guilt within a closure letter.

Administrative Adjudication Bill of Rights: Disqualification due to Prejudice

The administrative adjudication bill of rights in the APA (Sections 11425.10-11425.60) also provides for the disqualification of a “presiding officer” for “bias, prejudice, or interest in a processing.” (Section 11425.10 (a)(5).) The standard applicable to disqualification for prejudice in adjudication is whether a disinterested observer may conclude that the decisionmaker has in some measure adjudicated the facts as well as the law of a particular case in advance of the hearing. (See, e.g., *Lead Indus. Assn v. EPA* (1980) 208 U.S. App. D.C. 1, 647 F.2d 1130, 1177.) The term “presiding officer” covers both the ALJ and any other hearing officer or agency heads that engage in decisionmaking. (See Sections 11405.80 & 11425.40(c).)

Members of the Commission are presiding officers as the term is used in the APA, and would be prejudiced if they make decisions concerning the facts or merits of a specific matter by directing the terms of a closure letter. Accordingly, if the Commission’s reconsideration of a closure letter involves decisions on the facts or merits of the case, the Commissioners would likely be disqualified from acting as decisionmakers (presiding officers) in the event that the case were to be reopened as the result of additional information.

Generally, closure letters close cases without prejudice, and in the event newly discovered information is presented there is the possibility of reopening the investigation and Enforcement action. However, if the Commission is disqualified because it in some measure adjudicated the facts as well as the law in its reconsideration of a closure letter, this may impede the Enforcement Division’s ability to further pursue the matter should it acquire new information. For this reason, it is not advisable for the Commissioners to examine or reconsider a closure letter.

Administrative Adjudication Bill of Rights: Separation of Functions required under the APA

In 1987, the Legislature directed the California Law Revision Commission to study administrative adjudication and propose reforms to the APA. It declared: “Fundamental fairness in decisionmaking demands both that factual inputs and arguments to the decisionmaker on law and policy be made openly and be subject to argument by all parties.” (Recommendation: Administrative Adjudication by State Agencies (Jan. 1995) 25 Cal. Law Revision Com. Rep. (1995) pp. 55,105.) Consistent with this view, the Law Revision Commission proposed an administrative adjudication bill of rights.

The APA includes an “administrative adjudication bill of rights,” which requires state agencies to adopt some internal separation of functions, including limits on ex parte contacts as well as the internal separation of adjudicative functions from investigative, prosecutorial, and advocacy functions. (Section 11425.10(a)(4) & (8).) This separation of functions also requires that a decisionmaker must not have previously served in the capacity of an investigator,

prosecutor, or advocate in the case. (Section 11425.10(a)(4).) An administrative trial or hearing is not limited to the actual proceedings in which evidence is received and considered, but encompasses both prehearing and posthearing events and procedures. (See *Vollstedt v. City of Stockton* (1990) 220 Cal.App.3d 265.)

In *Dep't of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1, the California Supreme Court granted review to address how the APA applies to a unitary administrative agency – one that combines prosecutorial and adjudicative functions in resolving administrative matters. The Court stated:

While California's administrative agencies have considerable leeway in how they structure their adjudicatory functions, they may not disregard certain basic precepts. One fairness principle directs that in adjudicative matters, one adversary should not be permitted to bend the ear of the ultimate decisionmaker or the decisionmaker's advisors in private. Another directs that the functions of prosecution and adjudication be kept separate, carried out by distinct individuals. California's Administrative Procedure Act, adopts these precepts by regulating and strictly limiting contacts between an agency's prosecutor and the officers the agency selects to preside over hearings and ultimately decide adjudicative matters.

(*Id.*, p. 40.)

The required separation of functions under the APA administrative adjudication bill of rights should be considered if the Commission decides to re-write all or part of a closure letter. It also includes a ban on ex parte contacts that limit the Commission's ability to discuss the matter with the Enforcement Division unless the respondent has notice and an opportunity to participate in the communication.

The Commission May Address the Scope and Limits of Closure Letters as a General Regulatory Matter.

In light of the inherent pitfalls of examining and reconsidering a closure letter in a specific case, it is preferable that the Commission address the scope and limit of closure letters as a general regulatory matter if the Commission is concerned with the broadness, content, or tone of letters issued. In generally addressing the matter by regulation, there are no concerns with infringing a respondent's adjudicatory rights or disqualifying the Commission from future consideration of a specific enforcement matter.