



MEMORANDUM

To: Chair Remke, Vice Chair Eskovitz and Commissioners Casher, Wasserman and Wynne

From: Gary S. Winuk, Chief of Enforcement
Angela J. Brereton, Senior Commission Counsel

Date: May 22, 2014

RE: Assignment of Hearing to Administrative Law Judge (“ALJ”)

Case Name: In the Matter of Frank J. Burgess (FPPC Case No. 12/516)

I. INTRODUCTION

Respondent Frank Burgess was a member of the Board of Directors for San Gorgonio Memorial Healthcare District (SGMHD) from June 6, 2009 through December 3, 2010. In such capacity, Respondent Burgess was also a member of the Board of Directors for San Gorgonio Memorial Hospital (SGMH), located in the city of Banning in Riverside County, CA. At all relevant times, Respondent Burgess was a public official as defined in Section 82048, of the Political Reform Act (the “Act”),¹ and therefore he was prohibited from making, participating in making, or attempting to use his official position to influence a governmental decision in which he knew, or had reason to know, that he had a financial interest. (Section 87100.) In his private capacity, Respondent Burgess was the President and Chief Executive Officer of Banning Van & Storage, Inc., dba Burgess northAmerican, a moving and document storage business.

In this matter, Respondent Burgess violated the conflict of interest provisions of the Act by attempting to use his official position to influence a governmental decision when he gave a packet of informative materials to SGMH Board Members before they voted on whether to approve an agreement with a competing company and discontinue storing documents with Burgess northAmerican, a business entity in which Respondent Burgess held an economic interest under the Act.

Respondent in the above-referenced case has requested an administrative hearing on the Accusation attached hereto as Exhibit A. The Accusation alleges multiple violations of the Act.

The Executive Director has determined that the hearing should be conducted before an ALJ alone pursuant to Section 11512, subdivision (a).

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.

This memorandum is submitted to each member of the Commission pursuant to Regulation 18361.5, subdivision (b), which provides: “If the Executive Director determines that a hearing on the merits should be conducted before an administrative law judge alone pursuant to Government Code section 11512(a), he or she shall provide a copy of the accusation as well as a memorandum describing the issues involved to each member of the Commission. If, at the next regularly scheduled meeting, two or more Commissioners indicate a desire to participate in the hearing, the matter will be scheduled for a hearing before the Commission when an administrative law judge is available.”

II. PROCEDURAL HISTORY

A probable cause hearing was held on February 5, 2014. On February 18, 2014, the Hearing Officer issued an Order Re: Probable Cause (“Order”). The Order included a finding that there is probable cause to believe that the Respondent violated the Act, as set forth in the attached Accusation.

On April 22, 2014, the Accusation was personally served on Respondent. On or about May 1, 2014 Respondent served a Notice of Defense, requesting a hearing.

III. PROCEDURAL ISSUES

Every hearing in a contested case must be presided over by an ALJ. The agency itself shall determine whether the ALJ is to hear the case alone or whether the agency itself is to hear the case with the ALJ. (See Section 11512, subd. (a).)

When the agency itself hears the case, the ALJ shall preside at the hearing, rule on the admission and exclusion of evidence, and advise the agency on matters of law; the agency itself shall exercise all other powers relating to the conduct of the hearing but may delegate any or all of them to the ALJ. When the ALJ alone hears a case, he or she shall exercise all powers relating to the conduct of the hearing. A ruling of the ALJ admitting or excluding evidence is subject to review in the same manner and to the same extent as the ALJ’s proposed decision in the proceeding. (See Section 11512, subd. (b).)

IV. SUMMARY OF THE ACCUSATION

Respondent Frank J. Burgess was a member of the Board of Directors for San Gorgonio Memorial Healthcare District (SGMHD) from June 6, 2009 through December 3, 2010. In such capacity, Respondent Burgess was also a member of the Board of Directors for San Gorgonio Memorial Hospital (SGMH), located in the city of Banning in Riverside County, CA. Before sitting on the Board of Directors for SGMHD, Respondent Burgess was a member of the Banning City Council for 12 years.

At all relevant times, in his private capacity, Respondent Burgess was the President and Chief Executive Officer of Banning Van & Storage, Inc., dba Burgess northAmerican, a moving and document storage business located in Banning, CA. Respondent Burgess did not receive any compensation from Banning Van & Storage, Inc., dba Burgess northAmerican.

In April 2005, nearly four years before Respondent Burgess joined the Board of Directors for SGMHD, Burgess northAmerican entered into a contract for document storage and records management with SGMH. This contract had no expiration date, and SGMH was billed and obligated to pay monthly fees as long as documents remained in Burgess northAmerican's warehouse. Between April 6, 2009 and April 6, 2010, SGMH paid fees to Burgess northAmerican in the amount of approximately \$44,420.

In a staff report included in the April 6, 2010 agenda packet for the SGMH Board, SGMH staff recommended that the SGMH Board of Directors approve a 3-year document storage and service agreement with Docu-Trust Storage, and discontinue storing documents with Burgess northAmerican.

Immediately before the SGMH Board meeting on April 6, 2010, Respondent Burgess, with the approval of the SGMH Board executive secretary, placed a detailed 10-page packet of materials for the SGMH Board of Directors to read before voting to approve the Docu-Trust Storage agreement. The packet included a document entitled "Questions To Be Addressed Before Voting" regarding the Docu-Trust agreement, and a "corrected" annual cost comparison between the Docu-Trust proposal and Burgess northAmerican's services (the staff report for this agenda item included an annual cost comparison). When this item came before the SGMH Board, Respondent Burgess addressed the SGMH Board members indicating that he had distributed the packets and they "should review [the packet] before acting on this item." Respondent Burgess abstained from the vote, and the SGMH Board of Directors voted to approve the 3-year document storage and service agreement with Docu-Trust Storage.

Respondent does not deny that he distributed the packets and addressed the SGMH Board of Directors. However, Respondent Burgess contends that he was not acting with dishonesty or malicious intent in addressing the SGMH Board – he simply wanted the SGMH Board to have all the relevant information before they voted on the matter.

Respondent Burgess also contends that if the SGMH Board executive secretary had not given him permission, he would not have handed out the packet to the SGMH Board. Respondent Burgess' son, Todd, compiled the information in the packet that was presented to the SGMH Board. Todd Burgess could have presented the packet of materials, but Respondent Burgess did not believe that it was a problem to handle it himself. Counsel for the SGMHD and SGMH was not present at the April 6, 2010 SGMH Board of Directors meeting.

The Accusation consists of 1 count.

COUNT 1

Violation: Attempting to Use His Official Position to Influence a Governmental Decision in Which the Public Official Had a Financial Interest

Respondent Burgess violated the conflict of interest provisions of the Act by attempting to use his official position to influence a governmental decision when he gave a packet of informative materials to SGMH Board Members before they voted on whether to approve an agreement with Docu-Trust Storage, and discontinue storing documents with Burgess northAmerican, in which he had an economic interest as the President and CEO. As a member of the Board of Directors for San

Gorgonio Memorial Healthcare District (SGMHD), and consequently as a member of the Board of Directors for San Gorgonio Memorial Hospital (SGMH), which is a Board of SGMHD, Respondent Burgess was a public official. On or about April 6, 2010, Respondent Burgess attempted to use his official position to influence a governmental decision by giving a packet of informative materials to SGMH Board Members before they voted on whether to continue storing documents with Burgess northAmerican or to approve an agreement with Docu-Trust Storage instead. Respondent Burgess had an economic interest in Burgess northAmerican because he was President, Chief Executive Officer, and managed the Banning office of Banning Van & Storage, Inc., dba Burgess northAmerican. Burgess northAmerican was directly involved in the decision because the SGMH Board of Directors was voting to approve a document storage agreement with Docu-Trust Storage which would replace and terminate services which had been provided up until that time by Burgess northAmerican. In the 12 months prior to the decision, Burgess northAmerican received approximately \$44,420 from SGMH for document storage. Consequently, Burgess northAmerican would lose significant income if another company provided document storage services to SGMH, and thus, the financial effect of the governmental decision upon Burgess northAmerican was material. Additionally, it was reasonably foreseeable that the decision would have a material financial effect on Burgess northAmerican because Burgess northAmerican would unquestionably lose annual revenue if the SGMH Board of Directors approved an agreement with a competing document storage company. Thus, by attempting to use his official position to influence a governmental decision in which he had a financial interest, Respondent Burgess violated Government Code Section 87100.

The Accusation requests a monetary penalty pursuant to Section 83116, subdivision (c), of up to \$5,000.00 per count, for a total monetary penalty in an amount not to exceed \$5,000.

V. CONCLUSION

If, at the next regularly scheduled meeting, two or more Commissioners indicate a desire to participate in the hearing, the matter will be scheduled for a hearing before the Commission when an ALJ is available. (Regulation 18361.5, subd. (b).) Otherwise, hearing of this matter will be conducted before an ALJ alone pursuant to Section 11512, subdivision (a).