

UNAPPROVED AND SUBJECT TO CHANGE
CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION
MINUTES OF THE MEETING, Public Session

March 14, 2002

Call to order: Chairman Karen Getman called the monthly meeting of the Fair Political Practices Commission (FPPC) to order at 10:04 a.m., at 428 J Street, Eighth Floor, Sacramento, California. In addition to Chairman Getman, Commissioners Sheridan Downey, Thomas Knox, and Gordana Swanson were present.

Item #1. Approval of the Minutes of the January 15, 2002 Commission Meeting.

The minutes of the January 15, 2002 Commission meeting were distributed to the Commission and made available to the public.

Commissioner Swanson moved that the minutes be approved.

Commissioner Knox seconded the motion.

There being no objection, the motion carried.

Item #2. Public Comment.

There was no public comment at this time.

Item #29. Legislative Report

Executive Fellow Scott Burritt explained that Assemblyman Tom Harman requested Commission sponsorship of AB 1797. Under the bill, a public official who has a financial interest in a decision that will be under consideration by his or her agency will be required to (1) publicly state the specific nature of the conflict, (2) recuse himself or herself from discussing and voting on the matter, and (3) leave the room until the matter is concluded.

Mr. Burritt pointed out that public officials are already required to recuse themselves when they have a financial interest under the PRA, and that there is concern that a public official might be present at the meeting before realizing that a conflict exists, thus breaking the law under the proposal. The Commission previously required disclosure of the conflict but changed that in 2000 as part of its conflict of interest review.

The Commission in 2000 considered many factors, including concerns over how an official with a conflict would make the disclosure when absent from a public meeting or when making decisions outside the public meeting context.

Mr. Burritt stated that staff resources would be better used ensuring that public officials with a conflict do not participate in decisions rather than regulating the manner of disqualification.

Mr. Burritt pointed out that sponsorship of bills is generally limited to those proposals originating within the Commission. However, Assemblymember Harman has offered to work with the Commission on the bill.

Assemblyman Harman, who authored AB 1797, stated that he advocates mandatory disclosure. He explained that public officials sometimes do not disclose their conflict, and that he believed those conflicts should be disclosed. He gave examples of arguably inadequate disclosures, noting that public officials are often given conflicting advice from their legal counsels about what they should do when a conflict exists. He explained that the current version of the bill would not require that the official disclose his or her personal residence, and the official would not have to leave the room when the item under discussion is on the consent calendar. He believed this bill would benefit the public and those local officials who have to give advice to the public officials.

Assemblyman Harman offered to work with staff to address any concerns the Commission might have.

Commissioner Downey stated that the bill merited the Commission's attention, but that further discussion with staff would be required before the Commission considers sponsoring the bill. He urged Assemblyman Harman to work with staff.

Chairman Getman discussed the lengthy hearings on this topic in 2000, and moved that the Commission take no action to sponsor the bill at this time but continue to monitor and work with the Assemblyman's office and bring the bill back to the Commission for a fuller discussion at the April 2002 Commission meeting.

Assemblyman Harman noted that his office has worked with both CSAC and the League of Cities on this bill. Neither group had taken a position on the bill yet.

Chairman Getman amended her motion to give staff permission to work with Assemblyman Harman, the League of California Cities and CSAC on the bill.

Commissioner Downey seconded the motion.

There was no objection from the Commission.

Item #3. Proposition 34 Regulations: Adoption of Proposed Regulations 18520 and 18537.1 and Amendment of Regulations 18521, 18523, and 18523.1 regarding Sections 85200 and 85201 ("One-Bank-Account" Rule) and Section 85317 (Carry Over of Contributions.).

Assistant General Counsel John Wallace explained that § 85317 permits carryover of campaign funds without limit and without attribution of contributions to specific contributors. It differs from the transfer and attribution rule of § 85306, which is used in all other circumstances.

Mr. Wallace described option (A), noting that it would limit carry over to those funds raised in a primary election being carried over to a general election for the same office, or from a special primary to a special general election for the same office. Staff favored this narrow approach because the overall intention of Proposition 34 was to encourage transfer with attribution.

Mr. Wallace explained that option (B) was a broader interpretation of the statute and would allow carryover without attribution when a candidate is running for reelection to the same seat or when a challenger is running for the next subsequent election to the same office. Staff opposed this broad interpretation because it did not fit the overall intention of the proposition to limit contributions on a per-election basis.

Mr. Wallace presented option (C), which would allow carryover between committees established for different elections to different terms of the same office, but also included realistic limits. The limits were: (1) that the carryover would be allowed only for committees established for elections held under Proposition 34; (2) that the election for which the contributions were originally made had already been held; (3) that the committee carrying the funds forward have no net debt; and (4) that the funds being carried over not be surplus campaign funds.

In response to a question, Mr. Wallace compared options (A) and (C), noting that option (A) is very simple and would be easy to implement. Option (C) includes many limiting factors and may be a little more consistent with the language of the statute, but may be more complicated for the regulated public. Staff believed that both options would accomplish the same goal of keeping the exception narrow.

In response to a question, Mr. Wallace stated that he did not believe that option (A) would give staff more latitude, but would generate less confusion for the public.

Chairman Getman stated that option (C) did not seem complicated because the carryover provision applies only to Proposition 34 committees.

Mr. Wallace responded that the number of questions that must be asked in option (C) is greater, but that staff would be comfortable with that option.

Chairman Getman noted that option (B) was also very consistent with the statute but would allow candidates to fundraise for an old committee and use that money with no restrictions. She was not comfortable with that interpretation.

Commissioner Downey supported option (C), noting that the language of the statute may support option (B), but that he agreed with staff's concern that the exceptions be narrowed to maintain contribution limits.

Commissioner Knox expressed his concern that option (C) imported limitations on the exercise of rights under § 85317 that are not included in the statute. He questioned the basis for limiting carryover to committees without net debts.

Mr. Wallace noted that the restriction was also imposed in the federal law. That interpretation would allow committees to transfer funds that are not necessary for their election, but would not allow them to do so if they had debts. He noted that the general purpose was to move unneeded funds from a prior election, but only where debts had been paid.

In response to a question, Mr. Wallace stated that the Commission had previously discussed whether a committee's cash on hand must be used to pay net debt. He noted that there is no specific prohibition to spending money on hand when a committee has net debt.

In response to a question, Mr. Wallace stated that the proposed limitation in option (C), § 18537.1(b)(4), prevented "surplus funds" from being carried over, may not be necessary because the surplus funds statute is more specific and would not allow carryover of funds designated as "surplus funds." However, this section may not be necessary because the surplus funds statute is more specific and would not allow carryover of funds designated as "surplus funds." However, staff thought it appropriate to flag all restrictions that a candidate should be aware of, and Mr. Wallace suggested that the language should have been included in each of the options.

Mr. Wallace explained that officeholder campaign funds become surplus after they leave office. A challenger's funds become surplus following a "window period" after the election. If a challenger loses an election, and opens an election account for a subsequent election before funds have been designated as surplus, those funds could be carried over to a new election. Staff tried to refine the language to allow challengers to take advantage of the statute.

Chairman Getman moved that option (C) be approved without the net debt restriction.

Commissioner Downey stated that he liked the net debt restriction.

Commissioner Knox agreed, but noted that it was not part of the statute.

Commissioner Swanson agreed that the net debt limitation should not be included.

The Commission agreed to approve option (C) without subsection (b)(3).

In response to a question, Mr. Wallace stated that subsection (d) of option (C) made clear which rule would apply to a candidate who withdraws before the election. One option would allow carryover of funds after an election occurs. Another option would allow carryover when a candidate withdraws from an election. A third option prohibit the carryover of funds, but would require that the funds be transferred with attribution. The third option would discourage the creation of scam committees that could double contributions. Mr. Wallace pointed out that committees have been created without a real intention to run for an office, but rather for purposes

of creating a place to keep funds so that those funds will not become surplus. He could not guess whether this sort of "manipulation" would happen again in the future.

Chairman Getman noted that those actions may not be "manipulation" if a candidate is not sure what office to run for during the next election. She noted that the candidate can carryover only when the candidate runs again for the same office.

Mr. Wallace responded that staff saw a great difference in someone who raised money for an election and never actively campaigned compared to someone who raised money and campaigned for an office.

In response to a question, Mr. Wallace stated that staff recommended that the candidate be allowed to transfer the funds with attribution, but not be allowed to carryover the funds without attribution. Those attributed funds would then count towards the contribution limits for the subsequent election.

Commissioner Swanson questioned why the Commission would facilitate carrying over of funds for a candidate who withdraws from an election.

Chairman Getman questioned whether the agency should regulate for every possible contingency that might occur, noting that the chances of candidates manipulating committees in the manner suggested by Mr. Wallace is remote and may not warrant a law.

Commissioner Downey agreed with the Chairman, and added that the statute allows carryover contributions to a subsequent election to a same elective state office. He suggested that the limitation be deleted.

Commissioner Knox agreed, noting that it can be changed if a problem emerges.

There was no objection from the Commission to Commissioner Downey's suggestion.

Mr. Wallace introduced the proposed redesignation regulations, noting that staff was presenting regulations that specifically deal with the redesignation issue, and a second set of regulations that were clarifying amendments that grew out of staff's investigation into the redesignation changes.

Mr. Wallace recommended that regulation 18520 be adopted regardless of how the Commission chose to treat the redesignation issue. The regulation would codify a requirement of § 85200 that candidates file a statement of intent to be a candidate for each specific term of office, and was a regulation that was never approved by the Office of Administrative Law (OAH). Mr. Wallace noted that there no longer appeared to be any barriers to an approval to the regulation by OAH.

Commissioner Swanson moved that the Commission adopt regulation.

Commissioner Downey seconded the motion.

Chairman Getman noted that the current version of regulation 18520 seems to remove the right to file more than one statement of intention. Even though the past version of the regulation was not approved by OAH, it did serve as a basis for advice that the FPPC has given for years.

Mr. Wallace responded that staff had not intended to change that policy. They did not believe that it needed to be in the regulation since it was understood.

There was no objection to the motion to adopt regulation 18520.

Mr. Wallace explained that proposed regulation 18521 would allow the Commission to either codify or repudiate the redesignation rule in whole or in part. He pointed out that there had been an unwritten rule that candidates can redesignate existing campaign committees.

Mr. Wallace stated that the proposed language of regulation 18521(a) simply restates the law. Subdivision (b) provides the triggering mechanism for candidates for elected state office, and subdivision (c) provides the triggering mechanism for all other elected officers. Staff believed that elections under Proposition 34 should be handled differently, and therefore recommended codifying redesignation for all candidates for office other than candidates having elections under Proposition 34. New bank accounts and new committees should be established for each election under Proposition 34's new contribution and expenditure limits.

Staff recommended that subdivision (b) be deleted from the regulation, thereby prohibiting redesignation of campaign committees for candidates for elected state office. He recommended that subdivision (c) be retained to expressly allow redesignation for local elected officers.

In response to a question, Ms. Menchaca stated that local jurisdictions with contribution limits could prohibit redesignation as long as their rule did not prevent compliance with the PRA.

Chairman Getman suggested that the regulation clarify that a local candidate can redesignate unless prohibited by local law.

Ms. Menchaca agreed.

Commissioner Knox and Commissioner Swanson agreed with staff's recommendation.

Commissioner Downey was concerned that members of the public might oppose the new regulation eliminating redesignation.

Ms. Menchaca suggested that concerns over the redesignation issue may have been eliminated when the Commission chose to accept option (C) of the carryover regulation.

There was no objection from the Commission to accepting staff's recommendation on regulation 18521.

Mr. Wallace explained that the proposed amendments to regulations 18523 and 18523.1 were clarifying changes that grew out of staff's investigation into the one-bank-account issue. He

noted that regulation 18523 dealt with what a candidate with multiple committees should do upon receipt of a contribution not designated for a specific committee. Subdivisions were created in the regulation to make it easier to read and limiting language was added in subdivision (a) to ensure that a candidate could not accept a contribution in excess of the limits and divide that contribution among the candidate's various committees.

Mr. Wallace noted that staff had received some comment letters that let staff to amend regulation 18523.1. The regulation deals with what a candidate must state when soliciting contributions. Subdivision (a) of that regulation retains the existing rule for everyone except candidates for elected state office. Subdivision (b) provides different rules for those candidates.

Mr. Wallace pointed out that decision point 5 involves whether a candidate should instruct a contributor to designate a contribution. It had been longstanding advice that candidates should, but the regulated public perceived it as a technical requirement since the candidate could accept undesignated contributions. Staff and the regulated public recommended that the candidate not be required to tell the contributor to designate which committee should receive the contribution.

Commissioner Downey noted that the candidate must identify the committee for which the contribution is being solicited under subdivision (a). He agreed that the contributor should not also have to tell the contributor to make the designation.

Mr. Wallace agreed, and observed that staff was taking the opposite position by recommending that the candidate, when soliciting for a primary election, should notify the contributor. Staff believed that, since there were separate limits for the primary and general elections, it was useful for the candidate to provide that information. Additionally, it was important so that the candidate would know what the solicitation was for and it gave the contributor more information.

Chairman Getman questioned what difference it would make if the candidate was required to specify whether the solicitation was for the primary or general election, since the contributor can give one check that the candidate can designate for either election.

Mr. Wallace stated that it was important to give the contributor as much information as possible.

Commissioner Downey asked if this could create inconsistencies in what the major donor and the candidate would file on their reports.

Technical Assistance Division Chief Carla Wardlow stated that contributors are required to indicate whether their contributions are for the primary or the general election, and that it might be helpful to the contributor for purposes of reporting. She noted that there will be inconsistencies between what the candidate and the contributor report.

Chairman Getman moved that regulation 18523.1 be approved without the language in decision points 5 and 5a.

Commissioner Downey seconded the motion.

Commissioner Knox did not favor deleting the language in 5a, but did favor deleting the language in 5.

Chairman Getman stated that, if 5a is retained, it should encompass primary and general elections, as well as legal defense funds and runoffs and all other types of committees.

Mr. Wallace suggested that 5a could be eliminated and staff could revisit the issue later if necessary.

Ms. Menchaca agreed that it would be important to encompass a legal defense fund, but that the regulation was not noticed to include that issue and staff would have to bring it back to the Commission with notice if it is to be considered.

Mr. Wallace pointed out that the language in regulation 18537.1 Option C lines 7 through 9 should be deleted since the Commission had decided that redesignation should not be permitted.

Chairman Getman moved that Option C of proposed regulation 18537.1 be approved, with the deletion of subparagraphs (b)(3) and (d), and the deletion of lines 7 through 9, as well as any conforming changes staff deems necessary.

Mr. Wallace stated that staff would be happy to present those conforming changes back to the Commission for later review if the Commission wished to see them.

Commissioner Swanson seconded the motion.

Commissioners Downey, Knox, Swanson and Chairman Getman voted "aye". The motion carried by a 4-0 vote.

Commissioner Downey moved that regulation 18520 be adopted.

Commissioner Knox seconded the motion.

Commissioners Downey, Knox, Swanson and Chairman Getman voted "aye". The motion carried by a 4-0 vote.

Mr. Wallace pointed out that there were a few typographical errors in proposed regulation 18521 and that staff would correct those and present them back to the Commission later in the day.

Commissioner Swanson moved that the Commission adopt the amendments to regulation 18521, with the deletion of proposed subdivision (b) and retention of proposed subdivision (c), and adding, "unless otherwise prohibited by other local law" somewhere in lines 9, 10 or 11.

Commissioner Knox seconded the motion.

Commissioners Downey, Knox, Swanson and Chairman Getman voted "aye". The motion carried by a 4-0 vote.

Commissioner Swanson moved that the Commission adopt proposed regulation 18523.

Commissioner Downey seconded the motion.

Commissioners Downey, Knox, Swanson and Chairman Getman voted "aye". The motion carried by a 4-0 vote.

Commissioner Downey moved that the Commission adopt proposed amendments to regulation 18523.1, with the deletion of the language in decision points RE-5 and RE-5a.

Commissioner Knox seconded the motion.

Commissioners Downey, Knox, Swanson and Chairman Getman voted "aye". The motion carried by a 4-0 vote.

Chairman Getman announced that the Commission would be hearing item #24, *In The Matter of California Department of Water Resources*, after a break. She reminded those in attendance that the Commission does not allow public comment on the merits of an enforcement stipulation, under the Administrative Procedures Act, the Bagley/Keene Act and Commission policy. She noted that public comments may be made after the ruling.

The Commission adjourned for a break at 11:15 a.m.

The Commission reconvened at 11:35 a.m.

Item #24. In the Matter of the California Department of Water Resources, FPPC No. 01/335.

Chairman Getman asked Enforcement Chief Steve Russo to explain why he believed the proposed stipulation represented an appropriate resolution of the matter.

Mr. Russo explained that the case was brought against the Department of Water Resources (DWR) for failing to fulfill its duties as the filing officer for 52 consultants by failing to determine whether the consultants had timely filed their SEI's, and for failing to notify the consultants that they had not met their filing obligations, in violation of § 81010 of the PRA.

Mr. Russo outlined the facts of the case, noting that the California Resources Energy Scheduling Division (CERS) was established within the DWR in response to an order from the Governor to secure an adequate supply of electricity. Personnel were hired and contracts were made for the purchase energy for California. Fifty-two persons were hired as consultants, and, as such, participated in making governmental decisions on behalf of DWR.

Mr. Russo discussed the three different categories of duties that the consultants performed, dealing with the purchase of energy for California. He outlined DWR's duty to have a conflict of interest code and for that code to require consultants to disclose their financial interests, noting