



California Political Attorneys Association
c/o BELL, McANDREWS & HILTACHK, LLP
455 Capitol Mall, Suite 600
Sacramento, CA 95814
Telephone: (916) 442-7757
atitus@bmhlaw.com

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VIA EMAIL

Richard Miadich, Chair
California Fair Political Practices Commission
1102 Q St #3000
Sacramento, CA 95811

Re: Comment Letter on FPPC Law and Policy Committee Agenda Item No. 4

Dear Chair Miadich:

The California Political Attorneys Association (CPAA) offers comments on Agenda Item No. 4 which, if enacted, would significantly reduce the due process protections of those accused of violating the Political Reform Act (the Act). CPAA has participated cooperatively with the Commission since 1989 to promote better understanding of the legal and constitutional issues related to its enforcement function. We offer these comments today on these specific issues and would also welcome the opportunity to have a broader discussion of enforcement policies and issues with the full Commission, as we have done with previous Commissions.

CPAA has serious concerns with the proposed regulatory changes that would: eliminate the right to exculpatory and mitigating evidence in probable cause hearings; eliminate the ability for respondents to object to discovery violations by the Enforcement Division; limit the timeframe of probable cause hearings to 75 days absent a showing of good cause; allow for additional information to be submitted by the Enforcement Division to the Commission after probable cause hearing without providing an opportunity for rebuttal; and eliminate oral arguments before the Commission after administrative hearings. CPAA does not have concerns with the other proposed regulatory changes.

The due process rights the proposed regulatory changes are seeking to undo were added in 2011, under then-Chair Ann Ravel, with the input of many parties, including CPAA. These changes would eviscerate the purpose of the probable cause hearing process—to ensure that the FPPC Enforcement Division has sufficient facts and the proper interpretation of the law to proceed to an administrative hearing.

Many respondents, regardless of the merit of their defense, must enter into stipulations because they cannot afford the great expense of litigating their matter through an administrative hearing. Therefore, the probable cause hearing is often the only affordable way for respondents to make their case. It is also the only opportunity for respondents to challenge the case against them before the Enforcement Division's prosecution becomes public. As you are aware, findings of probable cause are made public in the Executive Director's Report at the Commission meeting immediately following the finding. The request for the Commission to authorize a hearing before the Office of Administrative Hearings (or before the Commission itself) is an issue that is placed on the agenda and discussed at a public Commission hearing. These public findings and actions have a negative effect on respondents before they have a full opportunity to exercise their administrative due process rights. As you know, the respondents in any given enforcement matter may be public officials or candidates whose futures can be dramatically affected, and elections lost, by mere allegations of wrongdoing. For that reason, the Political Reform Act protects those involved from attempts to unfairly manipulate the FPPC's enforcement process, or generally unfounded claims, by allowing them to defend themselves confidentially through the initial stages of the process. A fair probable cause hearing with its existing due process rights is the only way to avoid this harm.

Further, the Enforcement Division has not always prevailed in administrative hearings. This demonstrates that there are cases where the Enforcement Division's facts and/or legal interpretation have not been supported by neutral hearing officers. A couple of recent examples include: In the Matter of George Alai FPPC Case No. 13/1135 and In the Matter of Frank Burgess 12/516. There are other instances where the FPPC has declined to pursue an administrative hearing after a probable cause hearing due to exculpatory and mitigating information that was revealed at a probable cause hearing. The probable cause process will be severely weakened if the proposed regulatory amendments are adopted.

Specifically, here are CPAA's concerns with the proposed amendments:

Probable Cause Hearings (Amendments to Regulation 18361.4):

1. Elimination of the right of respondents to receive exculpatory and mitigating information during probable cause hearing process and the right to have exculpatory and mitigating information included in the probable cause report.

These rights were added into the regulation in 2011 to provide for basic due process in probable cause hearings. The FPPC staff articulate their rationale for elimination of this right in the staff report as: "Staff proposes eliminating the requirement that the probable cause report contain 'exculpatory and mitigating information and any other relevant material and arguments' because this information is not relevant to whether probable cause exists to believe a violation of the Act has occurred in the first instance, and therefore serves no purpose at the probable cause stage and can confuse the issue of whether there is cause to believe a violation occurred."

Adopting these changes would allow the Enforcement Division to conceal evidence from the respondents and the Commission that shows a violation did not occur. How could this evidence be “not relevant”? Omitting exculpatory evidence would defeat the entire purpose of the probable cause hearing, which is to determine, through a neutral Legal Division hearing officer, whether the Enforcement Division has enough evidence of a violation to put a respondent through the expense, time and negative public exposure of an administrative hearing. The proposed changes only require the Enforcement Division to provide a summary of the evidence in the Probable Cause Report, and whatever evidence they feel shows the violation occurred if discovery is requested by a respondent. Adoption of these amendments will leave virtually no check on the Enforcement Division before an administrative hearing, as the probable cause hearings will become completely one-sided. Allowing the Enforcement Division to hide exculpatory evidence will undermine the legitimacy and accuracy of case settlements compelled by the prohibitive cost of an administrative hearing.

Further, the FPPC Enforcement Division should welcome current disclosure requirements. This is because, at least with respondents represented by counsel, it will help drive case settlements if the respondent’s counsel has a full opportunity to review the evidence and can effectively weigh the chances of prevailing at an administrative hearing. It also helps the FPPC better understand the strengths and weaknesses of its own case, and the extent to which it is worth committing agency resources to prosecuting the case or settling it.

- 2. Eliminates the ability of respondents to appeal a discovery objection to the Hearing Officer.** Currently, the Probable Cause Hearing Officer has the ability to direct the Enforcement Division to provide required discovery when appropriate. This has allowed respondents to ensure they received required discovery. Under the proposed amended regulation, whatever the Enforcement Division provides at its sole discretion is final. This will eliminate any check on the Enforcement Division and severely limit the function of the Hearing Officer, who is supposed to be neutral and resolve disputed issues regarding the hearing and the case. What would be the value of a right to notice and an opportunity to be heard without an enforceable right to the evidence against you?

- 3. Imposes an arbitrary 75-Day limit on conducting probable cause hearings.** Hearing Officers currently have the ability to impose a hearing date on parties who are not working responsibly towards a hearing date. For parties represented by counsel, the Hearing Officer works with both parties, and their oftentimes busy trial calendars, to find a mutually agreeable date within a reasonable timeframe. Setting an arbitrary 75-day limit is problematic for a couple of reasons.

First, the timeline is too short given the regulatory timelines for briefs and discovery that are already in place. A respondent has 21 days from the receipt of a probable cause report to either file a response or request a hearing and discovery. If a request for discovery is made, there is no timeline for when the Enforcement Division must provide such

discovery. Assuming the Enforcement Division took just a single day to provide discovery, which is unlikely, that would leave 21 more days for a response, and 14 more days for the Enforcement Division Reply. That alone accounts for 57 days, which leaves only 18 days to conduct the hearing. For those respondents represented by counsel, it is very difficult to calendar a hearing that quickly, particularly since decisions regarding whether witnesses will be necessary cannot be made until after reviewing the discovery and Enforcement Division reply brief. If the Enforcement Division takes even a week to provide discovery, these timelines grow even shorter.

Second, although the proposed regulatory amendment allows for an extension of this deadline for “good cause,” it allows for potential abuse because the regulatory default is 75 days. Currently, without an arbitrary deadline, the default is to find a reasonable time that works for all parties. If either party is causing unreasonable delay, then the Hearing Officer may impose a hearing date as they do currently.

- 4. Allows for additional information to be submitted without rebuttal after probable cause hearing.** This proposed change would allow evidence to be submitted after the hearing by either party. It does not, however, allow for rebuttal of the additional evidence by either party. If either party is in possession of relevant evidence, then they should produce it during the briefing process or at the hearing so the other party may respond. With a discovery process in place, the ability of the Enforcement Division to provide an opening and a reply brief, and the opportunity for both parties to present argument and evidence at the hearing, there is no reason to allow either party to submit additional evidence after a hearing where no rebuttal to the evidence can be provided. The combination of allowing the Enforcement Division to conceal exculpatory evidence from the respondents, prohibiting the Hearing Officer from ordering required discovery, and permitting the Enforcement Division to inject unrebutted evidence after the hearing creates an unacceptable risk of abuse of the process and manipulation of the factual record.

Administrative Hearings (Amendments to Regulation 18361.9):

- 5. Eliminates the right of oral argument before the Commission for Commission hearings on Administrative Law Judge recommendations.** Every person, every system, and every human institution is susceptible of bias, error or misunderstanding. Oral argument is thus a key component of any administrative or legal proceeding. While there is always the chance of irrelevant or improper information being conveyed, this can be addressed through written or oral motions or objections as in other legal proceedings. The importance of oral argument clearly outweighs the potential harm of irrelevant information being presented. Oral argument also allows the Commission to communicate directly with the respondents, to ensure that its questions are satisfactorily answered. The Commission should not agree to forego this opportunity.

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For the foregoing reasons, the CPAA respectfully urges the Commission to not adopt the proposal to eliminate the due process measures addressed here. CPAA appreciates the Law and Policy Committee's willingness to consider these comments. We welcome further discussion on these issues with Committee members and staff.

Respectfully submitted,



Elli Abdoli
CPAA Enforcement Committee Chair



Emily Andrews
CPAA Regulatory Committee Chair