

TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

KAMALA D. HARRIS
Attorney General

OPINION	:	No. 14-401
	:	
of	:	
	:	October 9, 2014
KAMALA D. HARRIS	:	
Attorney General	:	
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LAWRENCE M. DANIELS	:	
Deputy Attorney General	:	
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Proposed relator SISKIYOU COUNTY, through BRIAN L. MORRIS, COUNTY COUNSEL OF SISKIYOU COUNTY, has requested leave to sue proposed defendants KIMBERLY R. OLSON and ROGER J. GIFFORD in quo warranto on the following question:

Does the doctrine of incompatible public offices preclude Kimberly R. Olson and Roger J. Gifford from simultaneously serving on both the Board of Directors of the Hornbrook Fire Protection District and the Board of Directors of the Hornbrook Community Services District?

CONCLUSION

Whether the offices of director of the Hornbrook Fire Protection District and director of the Hornbrook Community Services District are incompatible, such that Kimberly R. Olson and Roger J. Gifford are precluded from simultaneously holding both offices, presents substantial questions of fact and law warranting judicial resolution. Accordingly, the application for leave to sue is GRANTED.

ANALYSIS

The Hornbrook Fire Protection District (Fire District), was established under the Fire Protection District Law,¹ in order to provide fire protection and suppression services to its district inhabitants and property. The Hornbrook Community Services District (Water District), was established under the Community Services District Law,² in order to supply water to district inhabitants.³ Both the Fire District and the Water District are special districts located within the unincorporated territory of Siskiyou County in and about the census-designated place of Hornbrook. The Water District's geographical boundaries are entirely subsumed within the Fire District's area. Both districts are governed by a five-member board of directors.

On December 3, 2013, the Siskiyou County Board of Supervisors appointed proposed defendant Roger J. Gifford to the Fire District's Board of Directors in order to bring its membership to a quorum. On January 6, 2014, the Fire District's Board of Directors appointed proposed defendant Kimberly R. Olson to the Fire District's Board of Directors in order to serve the remaining term of a vacant director position. On January 14, 2014, the Water District's Board of Directors appointed Mr. Gifford and Ms. Olson to fill two board vacancies.

Proposed relator Siskiyou County, through its county counsel, Brian L. Morris (Relator),⁴ allege that proposed defendants Gifford and Olson (Defendants) may not

¹ Health & Saf. Code, §§ 13800-13970.

² Gov. Code, §§ 61000-61144.

³ Although the Water District was originally formed for the additional purpose of sewage disposal, we are informed that it has never engaged in this activity.

⁴ Defendant Olson claims that County Counsel Morris has a conflict of interest because his office represents not only the county, but the Water District and the Fire District as well. She also maintains that Morris previously advised Defendants that holding both director positions was lawful. And she argues that the county cannot pursue this lawsuit because it is not a private party authorized to bring suit under section 803 of the Code of Civil Procedure. We find these contentions unpersuasive. First, no conflict of interest is apparent from County Counsel Morris representing the county here, as there is no indication that county counsel has a duty to defend directors of these special districts against claims of incompatible offices, or that county counsel would in fact represent either or both districts in the given circumstances. (See Gov. Code, §§ 995, 27645; *Ward v. Superior Court* (1977) 70 Cal.App.3d 23, 30.) Second, that a defendant may have acted in good faith upon a legal opinion that the offices were compatible is irrelevant because the defendant's intent does not inform the determination whether two

lawfully hold both offices at the same time, and that their acceptance of appointments to the Water District in January 2014 therefore resulted in forfeiture of their seats on the Fire District. Relator requests our permission to file a quo warranto action in superior court, pursuant to Code of Civil Procedure section 803, to seek Defendants' removal from the Fire District. In light of the districts' overlapping jurisdictions and the potential for conflicting duties and loyalties that may arise for an individual simultaneously holding positions on both districts' boards of directors, we conclude that Relator has presented substantial issues of fact and law that warrant judicial resolution, and that the filing of the proposed action in quo warranto would serve the overall public interest. Accordingly, we grant Relator's application for leave to sue.

Code of Civil Procedure section 803 provides in pertinent part: "An action may be brought by the attorney-general, in the name of the people of this state, upon his [or her] own information, or upon a complaint of a private party, against any person who usurps, intrudes into, or unlawfully holds or exercises any public office . . . within this state." Quo warranto is the proper legal avenue to test title to public office.⁵ In determining whether to grant an application to file a quo warranto action, the Attorney General does not resolve the merits of the controversy but instead decides whether the application presents a substantial issue of fact or law that warrants judicial resolution, and whether granting the application would serve the overall public interest.⁶

Government Code section 1099, enacted in 2005,⁷ codifies the common-law rule against holding incompatible offices and reads, in part, "A public officer, including, but not limited to, an appointed or elected member of a governmental board, commission, committee, or other body, shall not simultaneously hold two public offices that are incompatible."⁸ Although section 1099 currently sets forth the law regarding incompatible public offices, administrative and judicial interpretations developed under the common law guide our construction and application of the statute.⁹

public offices are legally incompatible. (41 Ops.Cal.Atty.Gen. 98, 99 (1963).) Third, we and the courts have consistently interpreted section 803 as allowing for a public official or public agency to qualify as a relator. (E.g., *San Ysidro Irrigation Dist. v. Superior Court* (1961) 56 Cal.2d 708, 715-717; 95 Ops.Cal.Atty.Gen. 67, 76 & fns. 41, 42 (2012).)

⁵ 95 Ops.Cal.Atty.Gen., *supra*, at p. 68.

⁶ 93 Ops.Cal.Atty.Gen. 144, 145 (2010).

⁷ Stats. 2005, ch. 254, § 1.

⁸ Gov. Code, § 1099, subd. (a).

⁹ 95 Ops.Cal.Atty.Gen., *supra*, at p. 69; see Gov. Code, § 1099, subd. (f).

Section 1099 and established common-law precedent instruct that a person may not hold two public offices at the same time if any significant clash of duties or loyalties between the offices exists; if the dual officeholding would be improper for public policy reasons; or if either office exercises a supervisory, auditing, or removal power over the other.¹⁰ The prohibition applies only if each position is a public office, not merely a position of employment, and only if no statute permits one person to hold both offices.¹¹ In the event that two public offices are incompatible, the would-be dual officeholder is deemed to have forfeited the first office upon accepting the second.¹²

The rule against holding incompatible offices does not wait for an actual clash to occur, but rather intercedes to prevent it; the mere possibility of a conflict suffices to make two offices incompatible.¹³ “Only one potential significant clash of duties or loyalties is necessary to make offices incompatible.”¹⁴ “Neither is it pertinent to say that the conflict in duties may never arise, it is enough that it may, in the regular operation of the statutory plan. Nor is it an answer to say that if a conflict should arise, the incumbent may omit to perform one of the incompatible roles. The doctrine was designed to avoid the necessity for that choice.”¹⁵

Guided by these principles, we must resolve whether a substantial question exists as to whether the doctrine of incompatible offices applies in the circumstances presented. Initially, we must determine whether the two offices involved are “public offices” within the meaning of Government Code section 1099. On this point, we have previously determined that both a fire district directorship and a community services district directorship are public offices for purposes of the incompatible offices doctrine.¹⁶ Each one possesses the essential attributes of a public office because each is a (1) governmental position; (2) created or authorized by law; (3) the tenure of which is continuing and permanent; and (4) in which the incumbent performs a public function

¹⁰ Gov. Code, § 1099, subd. (a); 93 Ops.Cal.Atty.Gen., *supra*, at p. 146; see *People ex rel. Chapman v. Rapsey* (1940) 16 Cal.2d 636, 641-642 (*Rapsey*).

¹¹ Gov. Code § 1099, subs. (a), (c); 95 Ops.Cal.Atty.Gen., *supra*, at p. 69.

¹² 93 Ops.Cal.Atty.Gen. 110, 111 (2010).

¹³ *Ibid.*

¹⁴ 85 Ops.Cal.Atty.Gen. 199, 200 (2002).

¹⁵ 67 Ops.Cal.Atty.Gen. 409, 414 (1984), quoting 3 McQuillin, *Municipal Corporations* (rev. ed. 1973) § 12.67, pp. 295-296.

¹⁶ 89 Ops.Cal.Atty.Gen. 44, 46, fn. 6 (2006) (community services district director); 84 Ops.Cal.Atty.Gen. 94, 95 (2001) (fire protection district director).

and exercises some of the sovereign powers of government.¹⁷ Given that the two positions are public offices, we turn to the question whether there is a potential for any significant conflict or clash of interests or loyalties between the offices. To do this, we first set forth the duties and powers of each office.

The Fire District is a special district operating under the provisions of the 1987 Fire Protection District Law.¹⁸ The Fire District includes the area of Hornbrook and is governed by a five-member board of directors serving four-year terms of office.¹⁹ The district was formed for the purpose of supplying its inhabitants with fire protection and suppression facilities for the area that the district comprises. The district's authority includes the power to sue and be sued; to acquire any property, including water facilities for providing fire protection; to acquire by eminent domain any property necessary to carry out its powers or functions; to enter into contracts; and to establish and enforce rules and regulations for the operation of its services.²⁰

The Water District is a special district created under the provisions of the Community Services District Law.²¹ The district also includes the area of Hornbrook and falls entirely within the Fire District, and it is governed by a five-member board of directors serving four-year terms of offices.²² The Water District was formed in 1978 for the purposes of providing domestic water supply and sewage disposal. In 1980, the district acquired the assets of the Hornbrook Water Company, which included structures and property within the boundaries of the district. The district's powers include the power to adopt and enforce rules and regulations for the operation of its services; to sue and be sued; to acquire any property for the benefit of the district; to acquire by eminent

¹⁷ *Moore v. Panish* (1982) 32 Cal.3d 535, 545; see also *Rapsey, supra*, 16 Cal.2d at p. 640; 87 Ops.Cal.Atty.Gen. 54, 56-57 (2004); 82 Ops.Cal.Atty.Gen. 83, 84 (1999).

¹⁸ Health & Saf. Code, §§ 13800-13970.

¹⁹ See Health & Saf. Code, §§ 13840, 13842, 13843, subd. (a).

²⁰ Health & Saf. Code, § 13861, subs. (a), (b), (c), (f), (i).

²¹ Gov. Code, §§ 61000-61144. A community services district may perform many municipal functions, delivering up to 32 services, including water supply, sewage disposal, fire protection, and library services. (Gov. Code, § 61100; 73 Ops.Cal.Atty.Gen. 183, 185 (1990); Sen. Local Gov. Comm., *What's So Special About Special Districts?* (4th ed. 2010), at http://www.calafco.org/docs/Special_Districts/Whats_So_Special.pdf (as of Oct. 8, 2014).)

²² See Gov. Code, §§ 61040, subd. (a), 61042, subs. (a), (b).

domain any real or personal property; and to enter into contracts.²³ The Water District is also authorized to sell water to other agencies within the district, and, if there is a surplus, may sell to agencies outside the district.²⁴ Further, the Water District may establish different rates for different classes of buyers²⁵ and may choose to restrict water during a water shortage.²⁶

From these descriptions of the agencies' powers, we identify two well-established areas of potential conflict between the Fire and Water Districts. First, although at present the Fire District apparently does not purchase its water from the Water District, it could do so in the future.²⁷ If this were to happen, the Water District would set water rates for the Fire District as well as control the amount of water that the Fire District could use during any shortage.²⁸ We have repeatedly concluded that the power of two districts with common territory to enter into contracts for water presents a potential conflict for a public official of both districts for purposes of the incompatible offices doctrine.²⁹

A second substantial clash of duties and loyalties arises from the districts' common power of eminent domain to carry out their respective functions. This power could lead to disparate interests for the districts, if, for example, it was in both their interests to acquire the same water facilities.³⁰ Our opinions have also determined that

²³ Gov. Code, § 61060, subds. (c), (d), (e), (h).

²⁴ Gov. Code, § 61100, subd. (a); Wat. Code, §§ 71611, 71612.

²⁵ Wat. Code, § 71614.

²⁶ Wat. Code, § 71640.

²⁷ Indeed, the Water District's formation documents, as revised in August 1996, specifically contemplate that its water may be used "through the Fire Protection service . . . to extinguish fires and for testing the fire fighting equipment" and "may be obtained for filling tanks connected with the fire service."

²⁸ 85 Ops.Cal.Atty.Gen., *supra*, at p. 201 (where water district sets rates that indirectly affect rates charged to city, holding offices of water director and city councilmember involves potential conflict); 73 Ops.Cal.Atty.Gen. 268, 271 (1990) (the possible decisions of a water district to restrict water usage during an emergency might result in divided loyalties for someone acting as county water district board member and school district board trustee).

²⁹ 86 Ops.Cal.Atty.Gen. 205, 208 (2003); 76 Ops.Cal.Atty.Gen. 81, 85 (1993); 75 Ops.Cal.Atty.Gen. 10, 14 (1992); 67 Ops.Cal.Atty.Gen., *supra*, at p. 414; 64 Ops.Cal.Atty.Gen. 137, 140 (1981).

³⁰ See generally Code Civ. Proc., §§ 1230.010-1273.050 (Eminent Domain Law).

the common ability to exercise eminent domain within a given territory results in a potential conflict for a director of both districts.³¹

Apart from these well-settled bases for finding incompatible offices, we think that a third potential conflict may stem from the Fire District's statutory power to issue written orders to eliminate fire hazards on the Water District's property.³² Defendants provide a record of a recent inspection of the Water District's property by the California Department of Forestry and Fire Protection (CAL FIRE), but do not demonstrate that CAL FIRE's power to enforce fire laws on the Water District's property preempts the Fire District's authority to correct fire hazards.³³ If the Fire District did exercise its statutory power, the Water District's interest might be to challenge the written order before the Fire District board, especially if the order affected the Water District's property value or insurance.³⁴ If the Water District failed to correct the fire hazard, it could receive a misdemeanor citation from the Fire District.³⁵ Such scenarios present potential significant clashes of duties or loyalties for a person serving on both district boards.

These are three examples where what might be in the best interests of the Fire District might not be in the best interests of the Water District, or vice versa.³⁶ As only

³¹ 85 Ops.Cal.Atty.Gen., *supra*, at p. 201; 82 Ops.Cal.Atty.Gen. 74, 76 (1999); 80 Ops.Cal.Atty.Gen. 242, 244 (1997); 76 Ops.Cal.Atty.Gen., *supra*, at p. 85; 75 Ops.Cal.Atty.Gen., *supra*, at p. 14; 65 Ops.Cal.Atty.Gen. 606, 607-609 (1982); 37 Ops.Cal.Atty.Gen. 21, 22 (1961).

³² See Health & Saf. Code, § 13870, subd. (a); cf. 85 Ops.Cal.Atty.Gen., *supra*, at p. 202 (potential for conflict found based on the water district's responsibility to monitor the city's wells for contaminants).

³³ The Water District's property, we are told, is part of a "state responsibility area," which is defined by statute as an area "in which the financial responsibility of preventing and suppressing fires has been determined . . . to be primarily the responsibility of the state." (Pub. Resources Code, § 4102.)

³⁴ See Health & Saf. Code, § 13870, subds. (b), (c).

³⁵ See Health & Saf. Code, §§ 13871, subd. (b), 13872.

³⁶ Other instances of conflict may be envisioned based upon the statutory power of each district. For instance, we are informed that the Hornbrook Fire Department has ceased operations due to a dispute between its volunteer firefighters and the board, and that CAL FIRE has been providing fire protection in the Fire District. (See Doyle, *Hornbrook's Entire Fire Department Quits*, Siskiyou Daily News (Feb. 27, 2014), at <http://www.siskiyoudaily.com/article/20140227/News/140229633> (as of Oct. 8, 2014).

one potential clash of duties or interests is sufficient for a finding of incompatible offices, we find that the question whether Defendants are unlawfully holding the office of director of the Fire District (i.e., because of their incompatible presence on the Water District's board of directors) presents substantial issues of fact and law that warrant a judicial resolution.³⁷

We further find that permitting Relator to sue in quo warranto would serve the overall public interest in ensuring that public officials avoid conflicting loyalties when performing their public duties. We generally “view the need for judicial resolution of a substantial question of fact or law as a sufficient ‘public purpose’ to warrant the granting of leave to sue in quo warranto, absent countervailing circumstances such as pending litigation of the issues or the shortness of time remaining in the term of office.”³⁸ No such countervailing circumstances exist here.³⁹

Accordingly, the application for leave to sue in quo warranto is GRANTED to determine whether the offices of director of the Hornbrook Fire Protection District and

Also, the Siskiyou County Board of Supervisors recently discussed the desirability of examining special-district consolidations in the Hornbrook area. Relator suggests that as a result of these circumstances, the Water District might wish to exercise its latent statutory power to provide local fire protection services. For this to happen, however, the Water District would have to apply to the Siskiyou County Local Agency Formation Commission (LAFCO) for permission. And to grant that permission, the LAFCO would first have to find that the Fire District is not presently providing substantially similar services in the Water District's territory or else that the Fire District wished to divest its powers. (See Gov. Code, §§ 61001, subd. (c)(2), 61002, subd. (h), 61106, 61107, 61100, subd. (a); Wat. Code, § 71680, subd. (b); 95 Ops.Cal.Atty.Gen. 26, 26-27 (2012).) Although the Fire District and the Water District may have different interests under this hypothetical, we need not decide whether it presents a substantial question of incompatibility given our findings of potential conflicts discussed above.

³⁷ There is no legislative abrogation of the prohibition against incompatible offices with respect to the two offices in question.

³⁸ 95 Ops.Cal.Atty.Gen. 77, 87 (2012).

³⁹ Defendants complain that Relator is attempting to bring this action based on an alleged vendetta in order to harass Defendants from office and impose costs. We, however, “normally do not attempt to assess the motivation of individual relators.” (75 Ops.Cal.Atty.Gen. 112, 116 (1992); accord, 95 Ops.Cal.Atty.Gen., *supra*, at p. 75, fn. 39.) Rather, the public interest is “our paramount concern.” (76 Ops.Cal.Atty.Gen. 38, 44 (1993).)

director of the Hornbrook Community Services District are incompatible, such that Kimberly R. Olson and Roger J. Gifford are precluded from simultaneously holding both offices.
