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OPINION	:	No. 79-1111
of	:	May 15, 1980
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SUBJECT: MOTION PICTURE COUNCIL—The statute authorizing the appointment of a legislator as a member of the Motion Picture Council violates article IV, section 13 of the California Constitution. For this reason it is not "permissible" for a legislator appointed to the council to vote, make motions, serve as chairperson or otherwise act as a member of the council. The validity of actions of the Motion Picture Council would not be affected by a legislator acting as a member of the council.

The Honorable Jacques Barzaghi, Assistant to the Governor for Liaison and Coordination, has requested an opinion on the following questions:

1. Is it permissible for a member of the Legislature, appointed as a member of the Motion Picture Council, to vote, make motions, or serve as chairperson or other officer of the council?

2. If it is not permissible for a member of the Legislature to vote, make motions, or serve as an officer of the council, what effect would such participation by a member of the Legislature have upon the validity of the council's actions?

CONCLUSIONS

1. The statute authorizing the appointment of a legislator as a member of the Motion Picture Council violates article IV, section 13 of the California Constitution. For this reason it is not "permissible" for a legislator appointed to the council to vote, make motions, serve as chairperson or otherwise act as a member of the council.

2. The validity of the actions of the Motion Picture Council would not be affected by the participation of a legislator acting as a member of the council pursuant to an appointment made under the unconstitutional statute.

ANALYSIS

The first question is whether it is permissible for a member of the Legislature, appointed as a member of the Motion Picture Council, to vote, make motions or serve as chairperson or other officer of the council. Government Code section 14998.2 provides for a Motion Picture Council consisting of 14 members, two of which are appointed by the Senate Rules Committee, two by the Speaker of the Assembly, and ten by the Governor. Government Code section 14998.2 also provides in part:

> "One of the members appointed by the Senate Rules Committee shall be a Senator and one of the members appointed by the Speaker shall be a member of the Assembly at the time of the appointment. Such persons shall be appointed for terms of four years."

Government Code section 14998.3 provides in part that "[a]ny legislators appointed to the council shall meet with and participate in the activities of the council to the extent that such participation is not incompatible with their respective positions as members of the Legislature."

Article III, section 3 of the California Constitution embodies the doctrine of separation of powers:

> "The powers of the state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as is permitted by this constitution."

Article IV, section 13 of the California Constitution is essentially an implementation of that doctrine specifically applicable to the legislative branch. It provides:

> "A member of the Legislature may not, during the term for which the member is elected, hold any office or employment under the state other than elective office."

These two constitutional provisions were discussed by the Supreme Court in *Parker v. Riley* (1941) 18 Cal. 2d 83. In that case the Supreme Court considered the constitutionality of a statute which provided for the creation of the California Commission on Interstate Cooperation. (See Stats. 1939, ch. 376.) The commission was charged with the duty of furthering the participation of the state as a member of the Council of State Governments and was required to confer with officials of other states and of the federal government to formulate proposals for mutual cooperation between governments. It was instructed to establish committees and advisory boards, to formulate proposals and to report those proposals to the Legislature and the Governor. The same statute also created a Senate Committee on Interstate Cooperation and an Assembly Committee on Interstate Cooperation which were to be chosen as are other committees of each branch of the Legislature and which were to function during the interim between sessions as well as during the regular sessions. The membership of the Commission on Interstate Cooperation was to be made up of five members of the Senate Committee, five members of the Assembly Committee, and five other officials appointed by the Governor. The members of the commission which were also members of the Legislature held office so long as they remained members of the committees of each house.

The Supreme Court in that case held that the statute did not violate the constitutional prohibition on legislators holding any other nonelective office, trust or employment. It stated that it doubted that the positions constituted employment since no compensation was involved. The Court also was of the opinion that the positions were not an office or trust since they merely involved the interchange of information, the assembling of the data and the formulation of proposals to be placed before the Legislature. The Court stated "such tasks do not require the exercise of a part of the sovereign power of the state." (18 Cal. 2d at p. 87.)

The Court, however, rested its decision on more fundamental grounds. Assuming but not deciding that the positions created under the statute amounted to an office, trust or employment under the state, the Court held:

> ". . . The constitutional provision clearly implies that the prohibition is directed at the conferring of any other office, trust, or employment upon a member of the legislature. A member of the legislature is already an officer holding a position of trust under the state government. Where a statute merely makes available new machinery and new methods by which particular legislators may keep themselves informed upon specific problems, it cannot

> be said to have imposed upon them any new office or trust. The additional duties which rest upon the legislative members of the commission are identical in purpose and kind with those which they already perform. . . . (Emphasis in original.) (18 Cal. 2d at p. 88.)

The Court also rejected a contention that the statute creating the California Commission on Interstate Cooperation was unconstitutional because it violated the separation of powers clause of the California Constitution. The Court noted again that the duties of the council were merely incidental and ancillary to the ultimate performance of lawmaking functions of the Legislature.

The primary issue raised by the first inquiry is whether a member of the Legislature may be appointed to and serve on the Motion Picture Council in view of the prohibition of article IV, section 13 on dual office holding. To resolve this issue it is necessary to consider whether membership on the council would be another public office or trust for the legislator.

The Motion Picture Council, unlike the Commission on Interstate Cooperation, is not merely carrying out a trust already reposed in the members of the Legislature. The purpose of the Motion Picture Council is to encourage motion picture and television filming in California. (Gov. Code, § 14998.2.) One of its' duties is to make recommendations to the Department of Economic and Business Development and other agencies of state government on legislative or administrative actions in furtherance of this purpose. (Gov. Code, § 14998.2.) However, the council has the power and the authority to accept federal funds, to accept gifts, donations and bequests, to coordinate the activities of similar councils and boards appointed by any city or county, to establish fees to be paid for the use of state-owned property and state employee services for the purpose of making commercial motion pictures, to make application to the Director of General Services for permission to use state property for the making of motion pictures, and if necessary, to apply to the Commissioner of the Highway Patrol for assistance in control and protection of roads, highways and freeways used in connection with making a motion picture. (Gov. Code, §§ 14998.5, 14998.7.) The Motion Picture Council is also authorized to appoint an advisory commission to assist it in its function. (Gov. Code, § 14998.8.)

While the duties of the council include the proposal of legislation, the responsibilities of the council go far beyond "merely those of gathering information and making recommendations . . . [which] duties must be considered incidental to the lawmaking function." (*Parker v. Riley*, *supra*, 18 Cal. 2d at p. 88.) We especially note the authority of the council to set fees for the use of state property. Clearly, the council is charged with an exercise of part of the sovereign power of the state such that a council member would be considered holding an office the duties of which would be considered a

public trust. (See 17 Ops. Cal. Atty. Gen. 169, 172 (1951).)

Council membership for a legislator would be another office and another trust, and it would not be merely duties ancillary to his or her public office as a legislator with its attendant public trust. "[T]he term 'office' includes a public 'trust, the latter being more appropriately used to describe those duties and responsibilities of a public character that are temporarily or specially devolved upon persons." (17 Ops. Cal. Atty. Gen. 161, 172 (1951).) The public trust imposed on legislators is participation in the exercise of legislative functions. The primary function of a legislator is to enact laws for the government of society. Incidental and ancillary to such legislative function are the activities of fact-finding and formulating recommendations as a guide for future lawmaking. (17 Ops. Cal. Atty. Gen., *supra*, at pp. 172–173; see also *Parker v. Riley*, *supra*, 18 Cal. 2d at pp. 90–91.) The statutory duties of the Motion Picture Council could hardly be characterized as related or ancillary to legislative functions.

Although Government Code section 14998.3 restricts legislators who are appointed to the council from participating in council activities to the extent such participation is incompatible with their respective positions as members of the Legislature, the restriction is on the individual, not the office. Government Code section 14998.2 clearly provides that two legislators are to be appointed as "members" of the council. A public office exists independently of the person in it. (*Pacific Finance Corp. v. City of Lynwood* (1931) 114 Cal. App. 509, 514; see also 40 Ops. Cal. Atty. Gen. 121, 124 (1962).)

Here, the Legislature did not merely provide by statute that legislators shall be appointed to sit with the council as members of a legislative interim committee in order to ascertain facts and report thereon to the Legislature. (See, e.g., Gov. Code, § 15770)[1]; compare 40 Ops. Cal. Atty. Gen. 75 (1962) with 27 Ops. Cal. Atty. Gen. 5 (1956); see also 33 Ops. Cal. Atty. Gen. 47 (1959); 17 Ops. Cal. Atty. Gen. 169 (1951); 17 Ops. Cal. Atty. Gen. 88 (1951); 13 Ops. Cal. Atty. Gen. 115 (1949); 1 Ops. Cal. Atty. Gen. 232 (1943); 1 Ops. Cal. Atty. Gen. 16 (1943).) In the case of the Motion Picture Council, Government

[1] Government Code section 15770 provides:

"There is in the state government the State Public Works Board. The board consists of the Director of Finance, the Director of Transportation, and the Director of General Services. Three Members of the Senate, appointed by the Senate Committee on Rules, and three Members of the Assembly, appointed by the Speaker, shall meet with and participate in the work of the board to the extent that such participation is not incompatible with their positions as Members of the Legislature. The appointed Members of the Legislature constitute a legislative interim committee on the subject of this part with all the powers and duties imposed upon such committees by the Joint Rules of the Legislature."

Code section 14988.2 provides that the legislators are members of the council.

Moreover, Government Code section 14998.2 provides for two membership positions to be held by persons who are legislators "at the time of appointment." Under the terms of this statute, a legislator who is appointed to the council need not continue to hold office as a legislator to continue holding office as s council member.[2] Thus, it is clear that council membership for a legislator would not be merely an adjunct to his or her public trust as a member of the Legislature and the office of council member is another public "office" within the meaning of article IV, section 13 of the California Constitution.

We conclude, therefore, that members of the Legislature may not be members of the Motion Picture Council and accordingly they may not vote, make motions or serve as chairperson or other officer of the council.

The second question is what effect, if any, such participation by a member of the Legislature would have upon the validity of the council's actions. In order to answer this question, it is necessary to consider several issues. The first of these is the effect of the purported appointment of a member of the Legislature to the Motion Picture Council. Article IV, section 13 of the California Constitution prohibits a legislator from holding office "during the term for which the member is elected." Similar language in former section 19 of article IV, the predecessor to section 13, was held to preclude a legislator from holding office at any time during the term for which he was elected even though he had resigned his legislative post before his purported assumption of the duties of his new office. *(Chenoweth v. Chambers* (1917) 33 Cal. App. 104.) Thus, the purported appointment of a legislator to the Motion Picture Council pursuant to Government Code section 14998.2 would not authorize the legislator to hold the office of member of the Motion Picture Council. To the extent sections 14998.2 and 14998.3 purport to authorize a legislator to hold such membership, they are unconstitutional. Thus, in the situation presented by the instant request,[3] we conclude that the appointment of a legislator to the office of member of the Motion Picture Council is void.

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[2] Prior to its amendment by Statutes of 1978, chapter 962, section 1, Government Code section 14998.2 provided that "[t]he members of the council appointed by the Senate Rules Committee and the Speaker of the Assembly shall be members of the Legislature." (Stats. 1974, ch. 1226, § 1.) Thus, the addition by amendment of the qualifying phrase "at the time of appointment" clearly evidences the legislative intent that the members so appointed need not continue to hold legislative office.

[3] We assume for the purpose of this opinion that by reference to "a member of Legislature appointed as a member of the Motion Picture Council" the requestor is referring to a person who has assumed the office of council member while retaining the legislative post.

Thus the next issue which we must examine is the effect of the invalidity of the appointment of the legislator as a member of the Motion Picture Council on the actions of the council. The de facto officer rule provides:

> "One who claims to be a public officer while in possession of an office, ostensibly exercising its functions lawfully and with the acquiescence of the public, is a de facto officer. His lawful acts, so far as the rights of third parties are concerned, are, if done within the scope and by the apparent authority of office, as valid and binding as if he were the officer legally elected and qualified by the office and in full possession of it . . ." (*Ensher, Alexander & Barsoom, Inc. v. Ensher* (1965) 238 Cal. App. 2d 250, 255; *Oakland Paving Co. v. Donovan* (1912) 19 Cal. App. 488, 496.)

The de facto officer rule rests on the public policy and necessity to protect the interests of the public and individuals where those interests were involved in the official acts of persons exercising the duties of an office without being lawful officers. (*People v. Hecht* (1895) 105 Cal. 621, 629–630; *Oakland Paving Co. v. Donovan*, *supra*, 19 Cal. App. at pp. 493–494.) In *People v. Hecht*, *supra*, at page 621, the Supreme Court considered the case of two persons who were elected to the Board of Freeholders for the City and County of San Francisco but were ineligible to hold office because of their failure to meet a residence requirement. In applying the de facto officer rule the Court stated:

> "Again, the office of freeholder is created by the constitution. It is the *de jure* office. When Hellman and Bourn were elected by a plurality of the qualified electors, received their certificates of election, and qualified and participated in the action of the board, they were there under color of office and presumptively entitled to the office. They were de facto officers in the discharge of the duties of a de jure office, and as such their acts while they remained such were as valid and binding as those of *de jure* officers. . . ." (105 Cal. at p. 629.)

In California it has been held that in order for there to be a de facto officer there must first be a de jure office. (*People v. Toal* (1890) 85 Cal. 333.) Thus, it has been held that an office created by an unconstitutional statute cannot be a de jure office and thus there can be no de facto officer for such office. (*Buck v. City of Eureka* (1895) 109 Cal. 504, 512–513.) In *Buck v. City of Eureka*, *supra*, however, the Supreme Court held that an incumbent of office having an irregular or potential existence as distinguished from a nonexisting office or one void in its creation is a de facto office; thus, if an office has been even colorably created, any irregularity which does not render the creation of the office void does not prevent the application of the de facto officer rule.

In *Buck* the court held a person holding the office of city attorney to be at least a de facto officer, if not a de jure officer, despite the fact the city council had never passed an ordinance creating the office. The court noted that the Legislature had by statute provided the authority for the city council to create the office by ordinance. Thus, the court reasoned, the office had potential existence, the irregularity was created because "the council did not follow a prescribed mode in perfecting that potential existence." (109 Cal. at p. 517.)

In *People v. Elkus* (1922) 59 Cal. App. 396, the court declared the system of voting provided for in a city charter for the election of city council members unconstitutional. Nevertheless, the court found the persons who had been elected to the council pursuant to the unconstitutional charter provision to be de facto officers.

In view of the decisions in *Buck v. City of Eureka* and *People v. Elkus*, it is our conclusion that the de facto officer rule would apply to the case of a legislator appointed a member of the Motion Picture Council. The Legislature clearly has the constitutional authority to create the council and to provide for the appointment of members. Thus, the office of council member is a de jure office. It is only the provision of Government Code section 14998.2 which mandates that two members be legislators at the time of their appointment that is repugnant to article IV, section 13 of the state Constitution. The constitutional defect in the statutory scheme establishing the council pertains only to the manner of filling two membership positions. Thus, we conclude that a legislator appointed a "member" of the council would be deemed to be a de facto member of the council, and until the constitutional validity of his or her status is adjudicated by a court, his or *her* acts as a member would be deemed lawful and valid. (*Cf.* Gov. Code, § 1770, subparagraph (j).)

We also believe that despite the restrictive language of Government Code section 14998.3, a court would find that as a de facto member of the council the acts of a legislator in voting, making motions, or serving as an officer of the council would be within "the apparent authority of the office" of council member. (See *Ensher, Alexander & Barsoom, Inc. v. Ensher*, *supra*, 238 Cal. App. 2d at p. 255.) The purpose of the de facto officer rule is to protect the public and individuals who rely upon the acts of persons reasonably thought to be public officials acting within the scope of their authority. "[T]he status of a de facto officer is not to be decided particularly, if at all, on the issue of good faith on his part but rather upon the objective manifestations of office." (*Id*., at p. 257.) Government Code section 14998.3 does not purport to limit the scope of an "office," but merely the acts of the legislator holding the office. Since we have already concluded that a legislator is not entitled to be a council member at all during his or her term of office, we believe a court would find that any acts of a legislator as a de facto member of the council which are within the scope of the authority of a council member in general would be deemed valid.

Aside from the de facto officer rule, there is another reason why certain acts of the council would be valid. Civil Code section 12 and Code of Civil Procedure section 15 both provide:

> "Words giving a joint authority to three or more public officers or other persons are construed as giving such authority to a majority of them, unless it is otherwise expressed in the Act giving the Authority."

In *People v. Hecht*, *supra*, 105 Cal. at page 627, the court citing this rule stated the following:

> " . . . If a majority possesses all the authority of the whole, then such majority must be competent to its exercise.
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> "For all practical purposes the majority becomes the full board. It is the receptacle—the reservoir—of all authority conferred upon the whole, and its action, it is submitted, cannot be stayed by the nonaction, failure to qualify, absence, death, or want of eligibility of the minority."

Thus, if the members of the Motion Picture Council other than the "members" who are legislators constitute a quorum at a council meeting and by a vote of the majority of those members a motion is passed, action taken pursuant to such motion would be valid regardless of the participation of the legislators.

In answer to the second question, we conclude that even though a member of the Legislature is constitutionally precluded from assuming the duties of a member of the Motion Picture Council, participation by such member would not affect the validity of the council's actions, until the constitutional invalidity of his or her appointment is judicially declared.[5]

[5] The requestor also asked, "If impermissible participation by a member of the Legislature would affect the validity of the acts of the council, who would have standing to challenge such acts and what judicial relief would be available." In view of our conclusion to the second question that the council's acts would be valid, we do not reach this question.