

TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

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OPINION	:	No. 79-417
	:	
of	:	<u>June 15, 1979</u>
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SUBJECT: OATH OF OFFICE—Members of county advisory commissions whose functions are purely advisory and who receive no compensation other than reimbursement for actual expenses are not required to take an oath of office. Members of a County Planning Commission are county officers and are required to take the constitutional oath of office.

The Honorable John Drummond, County Counsel, Mendocino County, has requested an opinion on the following questions:

1. Are persons who are appointed to citizens advisory commissions or other advisory groups by boards of supervisors required to take an oath of office before assuming such positions?

2. Are members of a County Planning Commission required to take an oath of office prior to taking their positions on the Planning Commission?

CONCLUSIONS

1. Members of county advisory commissions or similar groups whose functions are purely advisory and not part of the governmental functions of the county and who receive no compensation other than reimbursement for actual expenses are not required to take an oath of office.
2. Members of a County Planning Commission are county officers and are required to take the constitutional oath of office.

ANALYSIS

The County Counsel advises that the Mendocino County Board of Supervisors has formed a number of boards and commissions to allow citizens to assist in the process of government. He cites as examples citizens advisory committees working on the preparation of the general plan, the Mendocino Historical Review Board which passes upon building permits for the historical town of Mendocino and a Trails Advisory Council. The County of Mendocino has a County Planning Commission as mandated by Government Code section 65100.

Section 3 of Article XX of the California Constitution requires all public officers and employees, except such inferior officers and employees as may be by law exempt, to take an oath of office before they enter upon the duties of their offices or employment.¹

¹ California Constitution, Article XX, section 3, provides:

“Members of the Legislature, and all public officers and employees, executive, legislative, and judicial, except such inferior officers and employees as may be by law exempted, shall, before they enter upon the duties of their respective offices, take and subscribe the following oath or affirmation:

“I _____ do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of California against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties upon which I am about to enter.

“And I do further swear (or affirm) that I do not advocate, nor am I a member of any party or organization, political or otherwise, that now advocates the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means; that within the five years immediately preceding the taking of this oath (or affirmation) I have not been a member of any party or organization, political or otherwise, that advocated the overthrow of the Government of the United

The term “public officer and employee” is defined to include every officer and employee of the state “. . . every county, city, city and county, district, and authority, including any department, division, bureau, board, commission, agency, or instrumentality of any of the foregoing.” Government Code section 1360 requires all officers to take and subscribe the constitutional oath prior to entry on the duties of office. This has been held to apply to county as well as state officers, but not employees. (*Hirschman v. County of Los Angeles* (1952) 39 Cal. 2d 698, 703.) Government Code section 3100 declares all public employees to be disaster service workers, and sections 3102 and 3103 require such disaster service workers to take the constitutional oath cited above before entry upon their duties of employment. These sections apply to county employees, among others. (*Bowen v. County of Los Angeles* (1952) 39 Cal. 2d 714, 715.) Government Code sections 18150–18151 require the constitutional oath to be taken by all state officers and employees. Thus, all public officers and employees in California must take the constitutional oath of office before beginning their duties. (See 28 Ops. Cal. Atty. Gen. 46 (1956).)

The issue presented, then, is whether the members of the various commissions cited by the county counsel are officers or employees within the meaning of article XX, section 3 of the Constitution. Although the court in *Hirschman v. County of Los Angeles, supra*, discussed the difference between an officer and an employee for purposes of Government Code section 1360 (prior to the adoption of the Levering Act, Government Code sections 3100 *et seq.*), no case that we have found deals with members of so-called advisory commissions and the constitutional oath. There are, however, numerous cases and opinions

States or of the State of California by force or violence or other unlawful means except as follows:

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“(If no affiliations, write in the words ‘No Exceptions’) and that during such time as I hold the office of _____ (name of office)

I will not advocate nor become a member of any party or organization, political or otherwise, that advocates the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means.’

“And no other oath, declaration, or test, shall be required as a qualification for any public office or employment.

“‘Public officer and employee’ includes every officer and employee of the State, including the University of California, every county, city, city and county, district, and authority, including any department, division, bureau, board, commission, agency, or instrumentality of any of the foregoing.”

Paragraph 2 of the oath has been declared unconstitutional. *Vogel v. County of Los Angeles* (1967) 68 Cal. 2d 18, 26, based on the authority of *Keyisbian v. Board of Regents* (1967) 385 U.S. 589 and *Elfbrandt v. Russell* (1966) 384 U.S. 11.

of this office that have analyzed the requisites for a public office or public employment in various contexts.

“ . . . A public office is ordinarily and generally defined to be the right, authority, and duty, created and conferred by law, the tenure of which is not transient, occasional, or incidental, by which for a given period an individual is invested with power to perform a public function for the benefit of the public. . . . The most general characteristic of a public officer, which distinguishes him from a mere employee, is that a public duty is delegated and entrusted to him, as agent, the performance of which is an exercise of a part of the governmental functions of the particular political unit for which he, as agent, is acting. . . .” (*Coulter v. Pool* (1921) 187 Cal. 181, 186–187.)

The court in the *Coulter* case held that a county ordinance creating the position of county engineer was invalid since it created an office without legislative authorization as then required by the Constitution.

The court in *People ex rel. Chapman v. Rapsey* (1940) 16 Cal. 2d 636, held that the positions of city judge and city attorney were both offices (and incompatible) and quoted from *Patton v. Board of Health* (1899) 127 Cal. 388, 398:

“ . . . In such a case, there is an unmistakable declaration by the Legislature that some portion, great or small, of the sovereign functions of government are to be exercised for the benefit of the public”

In the *Patton* case, the court held that one of the requisites of a public office is that it must be created by the Constitution or some statute. (127 Cal. 393. See also *Bennett v. Superior Court* (1955) 131 Cal. App. 2d 841, 843–844.)

In *Parker v. Riley* (1941) 18 Cal. 2d 83, the court examined whether the appointment of a legislator to the California Commission on Interstate Cooperation created an office which would violate article IV, section 19 (now section 13) prohibiting a legislator from holding any office or employment other than that of legislator. The court said (18 Cal. 2d at 87):

“ . . . Thus, it is generally said that an office or trust requires the vesting in an individual of a portion of the sovereign powers of the state. . . .”

The court then analyzed the commission in question and noted it involved “ . . . merely the interchange of information, the assembling of data, and the formulation of proposals to be placed before the legislature. Such tasks do not require the exercise of part of the

sovereign power of the state. . . .” (*Ibid.*) The court thus concluded that members of the commission were not officers.

This office examined the question of whether a judge could serve on an advisory board of the Joint Legislative Commission for the Revision of the Penal Code in light of California Constitution, article VI, section 18 (now § 17) making a judge ineligible for public employment or public office other than judicial. (42 Ops. Cal. Atty. Gen. 93 (1963).) It was concluded, after analyzing the *Parker v. Riley* and *Coulter v. Pool* cases that such an advisory board was not entrusted with any portion of the governmental powers of the state, and was therefore not an office. (*Id.* at 95.)

In a series of unpublished opinions, this office has examined various commissions and their duties to determine whether they constitute public offices for various purposes, and we have generally concluded, in line with the *Parker v. Riley*, *Coulter v. Pool* and *People v. Rapsey* cases and 42 Ops. Cal. Atty. Gen. 93, that if the boards or commissions do not exercise any sovereign power or governmental function, and are purely advisory in nature, they do not constitute offices, and their members are not public officers. Thus, in I.L. 68–190, May 15, 1968, we concluded that the Advisory Committee on Mental Health, the function of which was to advise the Director of Mental Hygiene, was not an office and a judge could serve on it. We concluded in I.L. 69–226, November 18, 1969, that a member of the State Citizens Advisory Council could also serve on a local mental health advisory board of a county since neither position was a public office as both were advisory only. Thus, these positions were not incompatible. In I.L. 70–177, October 6, 1970, we advised, based upon 42 Ops. Cal. Atty. Gen. 93 reasoning, that the District Securities Advisory Commission created by the State Treasurer was truly advisory in nature and had no statutory powers or duty which could call for its exercise of the sovereign powers of the state, and is, therefore, not an office. We reached similar conclusions in I.L. 72–88, April 8, 1972 (State Developmental Disability Planning and Advisory Council and I.L. 74–65, April 15, 1974 (Health Care Commission).

In contrast, in several instances we concluded that the functions involved did constitute a public office. For example, in I.L. 71–221, November 17, 1971, we determined that the directors of the San Benito County Saddle Horse Association, a nonprofit corporation which operated the San Benito County Fair under contract with the county were officers for purposes of conflict of interest statutes, since the corporation was performing county functions. We concluded in I.L. 72–143, August 16, 1972, that the Job Training Development and Placement Service Advisory Board, a nonprofit corporation created by statute, was more than advisory and performed affirmative duties. We advised that conflict of interest statutes applied to members of the board, who are officers for purposes of those statutes. Finally, in I.L. 74–65 referred to above relating to the California Health Care Commission, we concluded that the members of the State Board of Medical

Examiners and the California Hospital Commission, by virtue of their duties are public officers and subject to the conflict of interest provisions of Welfare and Institutions Code section 14301.5.

More recently, in 62 Ops. Cal. Atty. Gen. 126 (March, 1979) we examined the function of a student member of governing boards of community college districts, a position created by Education Code section 72023.5. That statute made the student selected a nonvoting member of the board, but authorized the student to sit with the board “. . . shall be recognized as a full member of the board at the meetings, including receiving all materials presented to the board members and participating in the questioning of witnesses and the discussion of issues.” On the question of whether the student member was required to take the constitutional oath of office, we concluded in the affirmative, noting that “[a]lthough the role of a student member is limited, he does perform some of the functions which are traditional prerogatives of the duly elected members of the board.” (62 Ops. Cal. Atty. Gen. at 132.)

Assuming an analysis of a particular position or commission leads to a conclusion that the members are not public officers since their duties are purely advisory and involve no exercise of sovereign power, it must still be determined whether the positions are those of public employment, since the constitutional oath requirements apply to public officers and employees. The court in *Patton v. Board of Health, etc., supra* (127 Cal. at 393) noted that not all public employments are public offices. The usual definition of an employee as one who is subject to the absolute control and direction of his employer in regard to any act, labor or work to be done in the course and scope of employment. (*Crooks v. Glens Falls Indem. Co.* (1954) 124 Cal. App. 2d 113, 121) is not particularly helpful to an analysis of the functions usually performed by commissions of the type under consideration here. The term “employee” may have different meanings in different contexts. (9 Ops. Cal. Atty. Gen. 115, 116 (1947).) There has evolved, however, one test that is relevant here. In *Parker v. Riley, supra*, after determining that the California Commission on Interstate cooperation was not a public office, the court stated (18 Cal. 2d at 87):

“. . . It may also be doubted whether the positions here conferred constitute an ‘employment’ by the state since no compensation is provided for the members of the commission. . . .”

Relying on this, this office stated in 42 Ops. Cal. Atty. Gen. 93, at 95, *supra*: “Further, the absence of any compensation indicates that membership on the board of Advisory Board to the Joint Legislative Committee for the Revision of the Penal Code) does not involve a ‘public employment’ within the context of the constitutional provision. . . .” We restated this conclusion in two letter opinions. (I.L. 72–76, March 9, 1972, relating to an area-wide mental retardation program board, concluding that such, being advisory in nature, was not

an office, and that lack of compensation other than reimbursement for actual and necessary expenses precluded membership from being a public employment; I.L. 72–88, *supra*, reaching the same conclusion.) Thus, there has evolved a general rule that compensation other than reimbursement for expenses is a prerequisite to public employment,² in contrast to the usual civil rule that lack of compensation does not preclude a determination that one is an employee. (See *Key Ins. Exchange v. Washington* (1970) 7 Cal. App. 3d 209, 212; *Chavez v. Sprague* (1962) 209 Cal. App. 2d 101, 111.)

Finally, in 59 Ops. Cal. Atty. Gen. 619, 620 (1976), we stated that positions on advisory commissions and analogous bodies are not “employments” for purposes of determining whether appointments to such bodies fall within the personnel exception to the Brown Act (Gov. Code § 54950).

It is suggested that as to many of the commissions of the type under consideration, there exists no statutory authority for their creation, and they therefore cannot be public offices.³ As noted above, the court in *Patton v. Board of Health* (127 Cal. at 393) held that one of the requisites of a public office is that it must be created by the constitution or statute. Even if statutorily authorized or created, however, such a commission is not necessarily a public office. (Cf. *Parker v. Riley, supra*, 18 Cal. 2d 83 (California Commission on Interstate Cooperation created by statute); 42 Ops. Cal. Atty. Gen. 93, *supra* (Advisory Board to Joint Legislative Committee for the Revision of the Penal Code created by statute).)

Distilling the above authorities, we conclude that each advisory commission or board must be examined before determining whether its members must take the constitutional oath of office. If such examination reveals that the functions or duties of such a commission are purely advisory, the commission does not exercise any of the sovereign or governmental powers or functions of the appointing political unit and the members receive no compensation other than reimbursement for necessary and actual expenditures, the members thereof are not public officers or employees and are not required to take the

² We note that compensation by the public agency is not a prerequisite to a determination that one holds a public office. (See 28 Ops. Cal. Atty. Gen. 46, 48 (1956).)

³ Former California Constitution, article XI, section 5 was an absolute prohibition against creation of a public office by a county board of supervisors without legislative or constitutional authority. (*Coulter v. Pool, supra*, 187 Cal. 181; 52 Ops. Cal. Atty. Gen. 215 (1969); 26 Ops. Cal. Atty. Gen. 29, 31 (1955).) The 1970 constitutional amendment which removed article XI, section 5 to article XI, section 1(b) revised that section, to include “the Legislature or the governing body may provide for other officers. . . .” We do not decide at this time whether this change overrules *Coulter v. Pool* or our previous opinions and whether a county ordinance or resolution is sufficient to create an office.

constitutional oath.

We do not have sufficient data to analyze each of the examples cited by the county counsel. We do suggest, however, that such functions as passing on building permits and preparation of the mandatory county general plan be carefully scrutinized to determine whether some governmental power has in fact been validly vested in such commissions. If so, they are public offices, and the members, under Government Code section 1360 and article XX, section 3 of the Constitution must take the oath of office before entering upon the duties of such offices.

We have no hesitancy in concluding that the County Planning Commission constitutes a public office and that the members thereof must take the constitutional oath of office. In 58 Ops. Cal. Atty. Gen. 323 (1974) we concluded that a County Planning Commission being statutorily created (Gov. Code § 65100 *et seq.*) constituted a public office because of the pervasive extent of its duties, and that membership in such office was incompatible with membership on a hospital district board and a water district board. Also in 56 Ops. Cal. Atty. Gen. 488 (1973), we concluded that membership on a County Planning Commission was incompatible with the office of trustee of a school district, both being public offices. Similarly, an analysis of the functions of the County Planning Commission led us to conclude in a letter opinion (I.L. 69-45, March 6, 1969) that members of such a commission perform a public function for a public benefit and are clothed with a part of the sovereignty of the state. Letter opinion I.L. 70-189 (October 7, 1970) reached the same conclusion as to a planning commission being a county office for purposes of Government Code section 1770 relating to absences from the state. The duties of planning commissions are extensive and unquestionably involve governmental functions. For example, planning commissions have extensive mandatory duties in drafting and approving a general plan (Gov. Code § 65350 *et seq.*); the county may delegate administration for enforcement of specific plans and regulations to the Planning Commission (Gov. Code § 65550); and the Planning Commission has a mandatory review, public hearing and recommendation function as to zoning ordinances (Gov. Code § 65853 *et seq.*). As such, County Planning Commissions are unquestionably public offices, and members must take the constitutional oath of office.
