TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

GEORGE DEUKMEJIAN
Attorney General

---

| | | |
|---|---|---|
| OPINION | : | No. 80-308 |
| of | : | September 8, 1980 |
| GEORGE DEUKMEJIAN<br>Attorney General | : | |
| Clayton P. Roche<br>Deputy Attorney General | : | |

SUBJECT: OCCUPATION OF SIMULTANEOUS POSITIONS—A deputy district attorney of Ventura County may not simultaneously hold either the elective office of recreation and park district director or the elective office of school district trustee.

The Honorable Michael D. Bradbury, District Attorney, Ventura County, has requested an opinion on the following question:

May a deputy district attorney in Ventura County simultaneously hold either the elective office of recreation and park district director or school district trustee in that county?

## CONCLUSION

The elective offices of recreation and park district director and school district trustee are incompatible with the office of deputy district attorney of Ventura County. Accordingly, a deputy district attorney may not simultaneously hold either of those offices.

## ANALYSIS

The District Attorney of Ventura County has approximately sixty deputies. Ventura County has established a separate office of county counsel. Accordingly, the district attorney has been relieved of the civil legal duties in the county, including advising and representing special districts and school districts. (See Gov. Code, §§ 26520, 26529, 27640–27648.) The question presented is whether, in Ventura County, a deputy district attorney may simultaneously hold either of the elective offices of recreation and park district director or school district trustee.

No constitutional or statutory provision or local regulation[1] either prohibits or permits such dual office holding.[2] In the absence of any specific law on the subject, the common law doctrine prohibiting the holding of incompatible offices is applicable. That doctrine was succinctly summarized in 36 Ops. Cal. Atty. Gen. 252, 254 (1960) as follows:

> ". . . The tests are whether there is any clash of duties or loyalties between the offices, whether considerations of public policy make it improper for one person to hold both offices, and whether either office exercises a supervisory, auditory, appointive, or removal power over the other. . . ."

See also *People ex rel. Chapman v. Rapsey* (1940) 16 Cal. 2d 636, the leading case in California on the subject, and *People ex re1. Bagshaw v. Thompson* (1942) 55 Cal. App. 2d 147, 154.

In 58 Ops. Cal. Atty. Gen. 241, *supra*, fn. 2, this office concluded that the offices of district attorney and school district trustee are incompatible under the common law doctrine even in counties where the office of county counsel has been established. We analyzed a number of the prosecutorial functions of the district attorney and then demonstrated how clashes of duties and loyalties could arise were the district attorney to also attempt to hold the office of school board member. These included such matters as the duty of the district attorney to investigate allegations of violations of the Ralph M. Brown Act (Gov. Code § 54950, *et seq.*); the duty of the district attorney to bring removal proceedings against any public officer in the county upon an accusation of the grand jury (Gov. Code § 3060, *et*

---

[1] With respect to potential local regulations, see discussion of section 1126 of the Government Code, *infra*.

[2] A recreation and park district director and a school trustee would hold "offices" (see Gov. Code § 1001: Pub. Resources Code §§ 5781.8, 5782 *et seq.*; 58 Ops. Cal. Atty. Gen. 241 (1975): *Cf.* 55 Ops. Cal. Atty. Gen. 36 (1972). Likewise, a deputy district attorney, as a deputy of a county officer, also holds an "office." (See 2 Ops. Cal. Atty. Gen. 178 (1943), Attorney General's Unpublished Opinion I.L. 64–143.)

*seq.*); the duty of the district attorney to act as the advisor to the grand jury which would include advice with respect to its duties to examine the books and records of "special-purpose assessing and taxing districts" (Pen. Code § 933.5) and others. Suffice it to say that each of the potential clashes of duties or loyalties would be equally applicable to the director of a special district such as a recreation and park district as to a school district trustee. Therefore, the ultimate issue presented herein is whether in Ventura County the common law doctrine against holding incompatible offices is applicable with the same force to a deputy district attorney in situations where his principal, the district attorney, could not hold both offices.

With respect to the powers and duties of deputies generally, section 7 of the Government Code provides:

> "Whenever a power is granted to, or a duty is imposed upon, a public officer, the power may be exercised or the duty may be performed by a deputy of the officer or by a person authorized, pursuant to law, by the officer, *unless this code expressly provides otherwise*." (Emphasis added.)

Additionally, section 1194 of the Government Code provides:

> "*When not otherwise provided for*, each deputy possesses the powers and may perform the duties attached by law to the office of his principal. (Emphasis added.)

As stated in *Sarter v. Siskiyou County* (1919) 42 Cal. App. 530, 536:

> ". . . In brief, *a deputy* under a public officer *and the officer* or person holding the office, *are*, in contemplation of law and in an official sense, *one and the same person. . . .*" (Emphasis added.)

(See also, generally, with respect to the relationship of the deputy to his principal: *People v. Hulbert* (1977) 75 Cal. App. 3d 404; *People v. Woods* (1970) 7 Cal. App. 3d 382, 387; *Wilbur v. Office of City Clerk* (1956) 143 Cal. App. 2d 636, 643–644; *People v. Purcell* (1937) 22 Cal. App. 2d 126, 133; *Foncht v. Hirni* (1922) 57Cal.App. 685.

Accordingly, if a deputy possesses all the powers and may perform all the duties of his principal, and in contemplation of law is "one and the same person as his principal, it would seem to inexorably follow that if his principal may not simultaneously hold a second office, neither may the deputy.

Our research has disclosed no California case which has ruled upon this question. However, opinions of this office have, over several decades, addressed the problem of incompatibility of office or other disqualification problems with respect to deputies. In some of these opinions the deputy-principal relationship was neither discussed nor considered. In others, the legal relationship between the deputy and his principal was either the controlling factor, or was at least treated as a relevant consideration. The actual results of these opinions have not been entirely consistent. The weight of opinion, however, appears to have followed the traditional analysis.

Thus, in a recent formal opinion, 59 Ops. Cal. Atty. Gen. 27 (1976), we concluded that a public defender could not set up a separate division to handle cases where the public defender himself was disqualified to act because of a conflict of interest. We stated:

> "In cases handled by the public defender's office it is the officeholder who is the attorney of record. The members of his staff are deputies. As such they exercise the powers and perform the duties of the public defender. (Gov. Code §§ 7, 1194, 24100.) They act on behalf of the public defender. Where two deputies represent conflicting interests in the same case, it is the same as one public defender representing both interests.
>
> "Because a separate division of the public defender's office would be only a part of the entirety of the office of the public defender, it is concluded that representation by such a division of conflicting interests would constitute a violation of the Rules of Professional-Conduct above quoted and that it would be unethical for two deputy public defenders from the same office to represent conflicting interests in the same case. (*Id.*, at p. 29.)

A more factually relevant opinion for our consideration herein is Attorney General's Unpublished Opinion I.L. 64–143 wherein we concluded that a *deputy* county counsel in Nevada County could not simultaneously hold the office of city attorney in the same county. We relied upon our prior formal opinion, 38 Ops. Cal. Atty. Gen. 113 (1961), which concluded that the office of county counsel (the principal office) and city attorney of a city in the same county were incompatible under-the common law doctrine. We also referred to and distinguished some prior opinions of our office, alluded to in footnote 2 of 38 Ops. Cal. Atty. Gen. 113, 115, as follows:

> "The reasoning and conclusion of 38 Ops. Cal. Atty. Gen. 113 (1961) are applicable in the instant situation. Further, Ops. Cal. Atty. Gen. No. 5953 (1927) and our letter to Hon. Ward Sheldon, District Attorney of Nevada County, 221 L.B. 948 (1942) which are referred to in said opinion and pertain to a city attorney's holding of the office of deputy district attorney, do not

> necessarily require a conclusion that a deputy county counsel may hold the position of city attorney. The treatment of said opinions in 38 Ops. Cal. Atty. Gen. 113 (1961) at best raises some question as to the validity of said opinions. Thus, footnote 2 specifically provides that 'those opinions were written at a time when the relationships between cities and counties were not so pervasive as they are today.' 38 Ops. Cal. Atty. Gen. at 115." (I.L. 64–143 at p. 2.)

We further relied upon the reasoning of *Sarter v. Siskiyou County, supra,* 42 Cal. App. 530, to the effect that a deputy acts in the stead of his principal, and is in contemplation of law, one and the same person as his principal.

In the same vein, in 30 Ops. Cal. Atty. Gen. 86 (1957) we concluded that neither the county counsel *nor the assistant county counsel* could be the attorney for a municipal water district in the same county based upon the common law doctrine of incompatibility of office. After an extensive analysis as to the incompatibility between the principal office of county counsel and the district office, we stated:

> "The conclusions expressed above with respect to the County Counsel also apply to an Assistant County Counsel whose duty it is to aid the County Counsel in carrying out his responsibilities (Gov. Code Sec. 27644)" (*Id.*, at p. 89.)

In 2 Ops. Cal. Atty. Gen. 177 (1943) we concluded that a deputy district attorney could not simultaneously hold the office of court commissioner. Although we did not specifically analyze the matter in the context of the principal-deputy relationship in concluding the offices incompatible, it is implied in the reasoning. In short, we concluded as we did based upon the conflict, of duties (or perhaps loyalties) which could arise where the deputy was called upon to act for his principal. We thus stated:

> "In other words, in the absence or inability of the judge of the Superior Court of the county to act, the Court Commissioner to this extent might become judge. A deputy district attorney represents the county, county officers, school district and other districts in the county. In an action against the county, particularly where writs such as writs of mandate are involved, he would be called upon to issue the writ as Court Commissioner acting in the capacity of Judge, when as Deputy District Attorney he should oppose it in the interest of his client, the county. Under such circumstances, his obligation as Deputy District Attorney comes in conflict with that required of him as Court Commissioner. The conflict necessarily arises by virtue of the duties of the respective offices involved, and hence the two offices are

incompatible. (*People ex rel. Ryan v. Green*, 58 N.Y. 295; *People v. Rapsey*, *supra*.)

"We conclude, therefore, that public policy renders it improper for one person to hold both offices." (*Id.*, at pp. 178–179).[3]

Thus, the statutory law with respect to the powers and duties of deputies (Gov. Code §§ 7, 1194, *supra*) as well as the weight of opinions of this office lead to the conclusion that a deputy district attorney may not simultaneously hold either the office of recreational park district director or school district trustee.

The obvious argument against such conclusion is that in an office such as a district attorney's office, where the office is of medium or large size, the district attorney may tailor the particular deputy's duties to avoid actual conflict. Or it may be that such a conflict may already be more theoretical than real from the duties already assigned. Accordingly, or so goes the argument, a deputy district attorney could also be a recreational and park district director or a school trustee so long as he was assured that he would not be assigned conflicting duties.

The foregoing argument, however, presents a number of problems. The major problem is that such solution has no basis in law. Stated otherwise, there is legally no such thing as a "limited deputy" unless otherwise provided by or pursuant to law (Gov. Code §§ 7, 1194, *supra*. See also, e.g., *People v. Woods*, *supra*, 7 Cal. App. 3d at p. 387: "Thus, in the absence of a county ordinance regulating and further defining the scope of the duties of deputy sheriffs, the general laws of the state touching such matters should govern"; 58 Ops. Cal. Atty. Gen. 780, 784 (1975): "Research has revealed no statutory provision limiting the authority to accept referendum petitions to any particular deputy or department of the county clerk's office"; compare, e.g., 36 Ops. Cal. Atty. Gen. 213, 215 (1960); "It appears manifest that the Legislature, by amending section 8 17, intended to restrict the term 'peace officer' to regularly employed and paid deputy sheriffs and to exclude special or honorary deputies who are not so employed").

[3] See also, generally, 34 Ops. Cal. Atty. Gen. 244 (1959) (deputy real estate commissioner city councilman not incompatible): Ops. Cal. Atty. Gen. No. 10962 (1936) (disqualification of district attorney to act as counsel for defendants in eminent domain action embraces deputies as well): Ops. Cal. Atty. Gen. No. 5953 (1927) (deputy district attorney-city attorney not incompatible): and Attorney General's Unpublished Opinions I.L. 69–196 (deputy county assessor-board member, municipal water district incompatible): I.L. 74–19 (assistant county assessor-school trustee incompatible): I.L. 65–37 (chief deputy building inspector-sanitary district board member not incompatible).

Another problem the suggested argument raises is that it permits the "tail to wag the dog." It provides the district attorney with "limited deputies" where the law permits him to have deputies who may exercise all his powers and duties, and to whom he may assign any of his deputies *as he sees fit.* In short, dual office holding of an incompatible nature by a deputy would limit the district attorney's powers with respect to that deputy regarding assignments.

Another problem the suggested argument raises would exist to a large degree in the same or medium size office, and to a lesser degree in a large office. Even if a deputy holding a second office is relieved of any duties with respect thereto, one of his fellow deputies would still have to perform those duties. The public interest could be prejudiced thereby because of the inability of the assigned deputy to act impartially with respect to his co-worker in the office. For example, one deputy district attorney might be required to advise the grand jury with respect to the audit of the books and records of a school district for which another deputy was responsible as a school board member (see Pen. Code § 933.5). The assigned deputy could easily, and even unconsciously, act contrary to the best interest of the public in such a situation. This is analogous to the concept that law partners should not represent conflicting interests any more thin an individual lawyer should represent them. (*Cf.* e.g., 62 Ops. Cal. Atty. Gen. 546 (1979).)

Despite all the foregoing, it still may be argued that the potential conflict in duties and loyalties which might arise is more theoretical than real, and if they did arise the deputy involved could abstain from any action with respect to the matter, and request the matter be reassigned. Abstention, however, has not been permitted under the common law prohibition as to holding incompatible offices. Nor has the fact that "conflict" may never arise constitute an "escape-hatch" from the rigors of the doctrine. As has been noted in the case law and our opinions, "[t]he policy as stated in . . . [*People ex rel. Chapman v. Rapsey*, 16 Cal. 2d 636 (1940), the leading California case on the subject] comprehends prospective as well as present clashes of loyalty. In the past this office has found incompatibility to exist with respect to *potential* conflicts of duty. . . ." (56 Ops. Cal. Atty. Gen. 488, 489 (1973), emphasis added.) "The existence of devices to avoid . . . [conflicts] neither changes the nature of the *potential* conflict nor provides assurance that they would be employed. . . ." (38 Ops. Cal. Atty. Gen. 121, 125 (1961), emphasis added.) "The public is entitled to have the *full* undivided services of each public officer. . . ." (17 Ops. Cal. Atty. Gen. 129, 130 (1951), emphasis added.)

As stated by the leading authority on local government matters:

> ". . . Neither is it pertinent to say that the conflict in duties may never arise, it is enough that they 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." (3 McQuillin, Municipal Corporations § 12.67, p. 297 (3d Ed. 1973).)

Finally, it may be urged that to prohibit a *deputy* district attorney from simultaneously holding two incompatible offices interferes with his "fundamental right" to run for and hold public office and engage in political activities.[4] (See generally, *Gay Law Students Ass. v. Pacific Tel. & Tel. Co*. (1979) 24 Cal. 3d 458, 487; *Johnson v. Hamilton* (1975) 15 Cal. 3d 461, 466–468; *Bagley v. Washington Township Hospital Dist*. (1966) 65 Cal. 2d 499; *Fort v. Civil Service Commission* (1964) 61 Cal. 2d 331, 334–335; *Kinnear v. City etc., of San Francisco* (1964) 61 Cal. 2d 341); 62 Ops. Cal. Atty. Gen. 365, 366 (1979).)

We note, however, that the right to engage in political activities is still subject to legitimate restraints to protect the governmental service. This has been made clear by the United States Supreme Court in its recent affirmation of *United Public Workers v. Mitchell* (1947) 330 U.S. 75 in *CSC v. Letter Carriers* (1972) 413 U.S. 548, upholding the Hatch Act and regulations thereunder (See also, *Broadrick v. Oklahoma* (1972) 413 U.S. 601.) We realize, however, that the Hatch Act involves prohibition against partisan political activity, wherein we are involved herein with nonpartisan district offices. Significant in this regard is the case, *State ex rel. Gonzales v. Manzagol* (N.M. 1975) 531 P. 2d 1203 (dismissed for want of a substantial federal question)[5] That case upheld a state regulation which prohibited a state employee from holding political office or being an officer in a political organization during his employment. The court also construed "political office" to include the nonpartisan office of city councilman. Relying inter alia upon *CSC v. Letter Carriers* and *Broadrick v. Oklahoma*, the court reasoned much as we have attempted to do herein—it pointed out the fact of potential conflict. Thus it stated:

---

[4] Whether in California there is in absolute fundamental right to run for or hold public office, even assuming no incompatibility problems, is not entirely clear. See discussion on this point in *Bay Area Women's Coalition v. City and County of San Francisco* (1978) 78 Cal. App. 3d 961, 965-968 The California Supreme Court held in *Johnson v. Hamilton*, *supra*, that there was such a fundamental right, at least where the three important rights of candidacy, voting and travel were affected by a state regulation, in that case a durational residency requirement for candidacy. (15 Cal. 3d at p. 468.) The United States Supreme Court has held the right to candidacy as fundamental only if it has a significant impact upon the rights of voters. (*Bullock v. Carter* (1972) 405 U.S. 134, 142–149.)

[5] We rely upon the discussion in *Cummings v. Godin* (R.I. 1977) 377 A.2d 1071, 1078-1079 regarding the possible distinction between partisan and nonpartisan political activities for authority that an appeal in the *Manzagol* case was dismissed by the United States Supreme Court. Such summary action by the United States Supreme Court constitutes a decision on the merits. (*Hicks v. Miranda* (1975) 422 U.S. 332, 343-346.) Accordingly, it has precedential value.

"In addition to the generally recognized dangers inherent in political activity by a state officer or employee, the fact that Petitioner is serving on the governing body of the City of Santa Fe may very well place him in a position of conflict with his state employment in regard to water rights claimed by the City of Santa Fe. Proper performance of his duties as a City Councilman and also as a Water Resource Assistant is almost certain to create conflicting demands upon his time, his energies, his capacities, and his loyalties.

"In our opinion, the provisions of § 5–4–42 (B), *supra*, are not constitutionally vague or overbroad, and the proscription which Petitioner seeks to evade constitutes a reasonable standard or restriction upon his employment by the State. *Nothing said in Minielly v. State*, 242 Or. 490, 411 P.24 69 (1966), in *Kinnear v. City etc., of San Francisco*, 61 Cal. 2d 341, 38 Cal. Rptr. 631, 392 P.2d 391 (1964), *or in Fort v. Civil Service Com'n of County of Alameda*, 61 Cal. 2d 331, 38 Cal. Rptr. 625, 392 P.2d 385 (1964) *upon which Petitioner relies, persuades us to the contrary. The restraints upon first amendment rights which were in involved in those cases are not comparable to the statutory proscription or to the activities of Petitioner with which we are here concerned."* (*Id.*, at P. 1207, emphasis added.)

The foregoing language in essence sets forth the rule that a governmental employer may constitutionally prohibit an employee from holding a second incompatible office or position. A fortiori, the common law doctrine may also constitutionally effectuate the same prohibition.

That this is so is the holding of the one case in another jurisdiction which our research has disclosed which directly ruled upon that question. In *Haskins v. State ex rel. Harrington* (Wyo. 1973) 516 P. 2d 1171 the court held that a school teacher could not hold the incompatible office of member of the board of trustees in which he was employed. The court's analysis as follows is persuasive:

"Considering Haskins' last proposition first, we are of the opinion that there is no constitutionally protected right to hold incompatible offices or employments. The antiquity of the common-law rule; the great number of cases in which it has been applied; the public policy served by a requirement of undivided loyalty; all lead us to conclude that application of the rule against holding incompatible offices, whether by the common law or as it might be declared by legislative enactment, does not result in an unconstitutional infringement of personal and political rights. The rights protected by §§ 2 and 3 of art. I of our constitution, as well as those protected

> under the first, ninth, tenth, and fourteenth amendments to the federal constitution, are not absolutes and do not preclude imposition, by decision or statute, of such reasonable restrictions on those rights as are in the public interest. Thus, while it has been said that a public officer or employee has the right to engage in political expression and run for political office, *Sweezey v. New Hamphire* (1957), 354 U.S. 234, 775. Ct. 1203, I L. Ed. 2d 1311; *Monitor Patriot Company v. Roy* (1971) 401 U.S. 265, 91 5. Ct. 621, 28 L. Ed. 2d 35, it has also been held that if this personal interest comes in conflict with a compelling state policy or interest the person's right must be considered subordinated to the public interest. *United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO* (1973), 413 U.S. 548, 93 5. Ct. 2880, 37 L. Ed. 2d 796, approves and reiterates the holding in *United Public Workers of America (C.I.O.) v. Mitchell* (1947), 330 U.S. 75, 675, S. Ct. 556, 91 L. Ed. 754, sustaining restraints imposed by Congress upon the right of federal officers and employees to participate in political activities. These decisions sustain the right of the sovereignty to impose reasonable restrictions on personal and political rights." (*Id.*, at pp. 1173–1174.)

For the foregoing reasons, that is (1) that a deputy and the principal officer are in law one and the same, and (2) that there is no constitutional right to hold an incompatible office, we conclude that in Ventura County a deputy district attorney may not simultaneously hold the elective offices of either recreation and park district director or school district trustee in the same county. In so concluding, we point out that Ventura County has a medium sized district attorney's office. Although under existing law we discern no basis for such result, we do not foreclose the possibility that as to a very large district attorney's office, the potential for conflict of duties, loyalties, or prejudice to the public might become so attenuated that a court would carve out an exception for such a large office. (*Cf. In re Charles L.* (1976) 63 Cal. App. 3d 760, no refusal of district attorney required under particular facts in office of over 400 lawyers where single deputy disqualified.)

Additionally, we do not foreclose the possibility that local regulation by charter, ordinance, or regulation pursuant to section 1126 of the Government Code may permit holding a second office by a deputy district attorney. No such local law or regulation, however, has been cited to us in the instant case.[6]

---

[6] Section 1126 of the Government Code prohibits local agency officers and employees from engaging in outside activities for compensation which are incompatible with, or in conflict with their duties to their public agency or with the functions of their public agency.

However, pursuant to subdivision (b) of section 1126 the appointing power, with the

*****

concurrence of the local governing body, may define the outside activities which are to be prohibited under the section.

Section 1126 may provide the solution for a difficult legal and practical problem in local public offices, just as the State Civil Service Laws have as to state offices. Such laws have in our view replaced the common law doctrine on incompatibility of office, and hence state officers are governed by the incompatibility of office, and hence state officers are governed by the incompatibility statement issued by their appointing power as required by section 19251 of the Government Code. (*Cf. Neigel v. Superior Court* (1977) 72 Cal. App. 3d 373.)