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OFFICE OF THE ATTORNEY GENERAL
State of California

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OPINION	:	No. 80-516
of	:	<u>July 22, 1980</u>
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SUBJECT: CLASHES OF DUTIES—In determining whether the offices of mayor of a general law city and director of an airport district with overlapping territory are incompatible, it is not necessary to find that actual clashes of duties and loyalties presently exist, as the potential for such clashes is sufficient to render the offices incompatible.

The Honorable Phillip D. Wyman, Assemblyman, Thirty-Fourth District, has requested an opinion on a question which we have rephrased as follows:

In determining whether the offices of mayor of a general law city and director of an airport district with overlapping territory are incompatible offices, must actual clashes of duties and loyalties be found to exist, or is the potential for such clashes sufficient to render the offices incompatible?

CONCLUSION

In determining whether the offices of mayor of a general law city and director of an airport district with overlapping territory are incompatible, it is not necessary to find that actual clashes of duties and loyalties presently exist, as the potential for such clashes is sufficient to render the offices incompatible.

ANALYSIS

This request for our opinion involves the question whether the offices of mayor of a particular general law city and director of an airport district with overlapping territory are incompatible, and hence may not be held simultaneously. (See, generally, *People ex rel. Chapman v. Rapsey* (1940) 16 Cal. 2d 636.) The city comprises approximately one half of the territory of the airport district. The district operates an airport which is located outside of the city. Additionally, the city owns and operates its own airport within the city and also within the boundaries of the district. The background material which gave rise to this request indicates that presently there are no significant “interactions” between the city and the district, although the two entitles occasionally share equipment. In the recent past, however, the district operated the city airport on behalf of the city. The background material also concedes that the *potential* for significant “interaction” between the city and the district exists. The question is raised, then, as to whether a potential for such “interaction” or dealings is sufficient to render the two offices incompatible.

With respect to the doctrine of incompatibility generally, this office stated in 40 Ops. Cal. Atty. Gen. 238 (1962):

“Under the traditional common law rule, a public officer who is appointed or elected to another public office and enters upon the duties of the second office, automatically vacates the first office if the two are incompatible. *People ex rel. Chapman v. Rapsey* 16 Cal. 2d 636, 644, (1940). Offices are incompatible, in the absence of statutes suggesting a contrary result (e.g., the consolidation statutes, Gov. Code §§ 24300, 24304; see 23 Ops. Cal. Atty. Gen. 22, 24 [1954]), if there is any significant clash of duties between the offices, if the dual office holding would be improper for reasons of public policy, or if either officer exercise~ a supervisory, auditory, or removal power over the other. 16 Cal. 2d at 640–644; 38 Ops. Cal. Atty. Gen. 113 (1961).”

This general summary of the doctrine was, however, amplified as pertinent herein in 56 Ops. Cal. Atty. Gen. 488, 489 (1973) to demonstrate that the doctrine is based upon a clash of duties and loyalties as comprehended by the nature and functions of the office itself—and not merely upon existing clashes, or clashes which must surely occur. We thus stated:

“ . . . This doctrine arises out of considerations of public policy:

“Two offices are said to be incompatible when the holder cannot *in every instance* discharge the duties of each. Incompatibility arises, therefore,

from the nature of the duties of the offices, when there is an inconsistency in the functions of the two, where the functions of the two are inherently inconsistent or repugnant as where antagonism *would* result in the attempt by one person to discharge the duties of both offices, or where the nature and duties of the two offices are such as to render it improper from considerations of public policy for one person to retain both” *People ex rel. Chapman v. Rapsey* 16 Cal. 2d 636, 641, 642 (1940). (Emphasis added.)

As stated in 17 Ops. Cal. Atty. Gen. 129, 130 (1951), ‘The public is entitled to have the full *undivided* services of each public officer.’ (Emphasis added.) See also 21 Ops. Cal. Atty. Gen. 94, 97, (1953). When these services in the form of duties clash, divided loyalty is the result.

“The policy as stated in *Chapman* 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. See, e.g., 53 Ops. Cal. Atty. Gen. 302 (1970), 38 Ops. Cal. Atty. Gen. 113, 115 (1961), 30 Ops. Cal. Atty. Gen. 184, 186–187 (1957), 21 Ops. Cal. Atty. Gen. 94, 96 (1953), 19 Ops. Cal. Atty. Gen. 119, 124–125 (1952), 15 Ops. Cal. Atty. Gen. 265, 266 (1950). ‘Only one significant clash of duties and loyalties is required to make . . . offices incompatible . . .’ 37 Ops. Cal. Atty. Gen. 21, 22 (1961). ‘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).”

(See also 63 Ops. Cal. Atty. Gen. 607 (1980), Opinion No. 80–601; 58 Ops. Cal. Atty. Gen. 323, 325 (1975); quoting and applying the principle that “potential” conflicts are enough.)

Despite the foregoing recent expression of our opinion on the question of “potential” conflict, it has been suggested that our opinions in the area of incompatibility of offices have been such that no recognizable pattern has been developed. We are cited to our opinions in 48 Ops. Cal. Atty. Gen. 141 (1966) and 33 Ops. Cal. Atty. Gen. 49 (1959) as analyses based upon *actual* conflict, and to our opinion found in 58 Ops. Cal. Atty. Gen. 109 (1975) as apparently an opinion not in conformity to the usual approach of holding conflicting offices to be incompatible.

Initially, we note that in addition to the opinions cited in the quotation above from 56 Ops. Cal. Atty. Gen. 488, 489, *supra*, to the effect that the doctrine concerning incompatibility of office comprehends potential as well as actual conflicts in duties, we can cite other formal opinions of this office going back to 1931 where we have concluded

offices to be incompatible because of the potential for conflict. (See 2 Ops. Cal. Atty. Gen. 178 (1943): “In other words, It is not a question of the use of the powers that creates incompatibility, but the possibility of such use through the possession of inconsistent functions.”; Ops. Cal. Atty. Gen. No. N.S. 3152 (1940) at p. 2: “There are many situations in which this conflict of interest might arise” if a city councilman of a city of the fifth class were also a county supervisor; Ops. Cal. Atty. Gen. No. 7612–a (1931) at p. 4: “I fully appreciate the fact that it is not the intention to require services of these officers which would bring about this obvious conflict in their duties, but in passing upon the legal status of the matter I am constrained to consider it from the viewpoint whether or not an incompatibility of this character could arise.”)

The fact that some of our opinions had analyzed the question of incompatibility from the viewpoint of *actual* conflict does not detract from the fact that potential as well as actual conflicts of duties and loyalties are encompassed by the doctrine. Obviously, where there are existing conflicts, or there are conflicts which in the ordinary course of events must occur, the analysis need not proceed upon possibilities or “potential” conflicts. This would appear to have been the case in 33 Ops. Cal. Atty. Gen. 49, *supra*, which was cited to us in background material. Admittedly, 48 Ops. Cal. Atty. Gen. 141, *supra*, also cited to us states that:

“ . . . Where the two public bodies involved are, as here independent of each other, with neither exercising supervisory or auditing powers over the other, it is necessary to find more than the mere possibility of conflict, or even occasional conflict, which satisfies the test [o incompatibility]” (*Id.*, at p. 144.)

This language on both points, that is, (1) the question of *potential* conflict, and (2) the number of requisite conflicts is inconsistent with both prior and subsequent opinions of this office on these points. Accordingly, it is hereby disapproved insofar as it indicates that potential conflict will not suffice and insofar as it indicates that more than one significant clash of duties or loyalties is required to render offices incompatible.¹

¹ With respect to the “number of conflicts” required, that opinion relied upon 29 Ops. Cal. Atty. Gen. 1 (1957) which did not purport to rule in any way on the question of incompatibility of office, since it was neither raised nor discussed therein. Furthermore, the following paragraph of that opinion cites our prior opinions to the effect that only one significant clash of duties or loyalties is required to render offices incompatible, thus making it internally inconsistent on that point. Finally, that opinion, insofar as it indicates that a judicial determination is necessary before the first office is deemed to have been *automatically* vacated has no support in the case law, or our opinions, and is also disapproved on that point “The common law rule is that the acceptance by a public officer of another office which is incompatible with the first thereby vacates the first office; that is, the mere acceptance of the second incompatible office per se terminates the first office as

As to 58 Ops. Cal. Atty. Gen. 109, *supra*, cited as apparently out of conformity with our traditional approach in incompatibility opinions, we merely note that in that opinion we concluded that the *office* of school trustee and the position of member of the personnel board of a *particular city* did not fall within the doctrine because the personnel board members in that case were creatures of contract, and hence did not hold an *office*. As we noted in that opinion, “the doctrine has not been applied where one of the positions is merely a public employment,” (*Id.*, at p. 111). Thus, that opinion is not inconsistent with our other opinions so as to make a pattern indiscernible.

Accordingly, it is concluded that in determining whether the offices of mayor of a general law city and director of an airport district with overlapping territory are incompatible offices, actual clashes of duties or loyalties need not be found to exist. The potential for significant clashes is sufficient to render the offices incompatible. As stated by the leading authority in the field of municipal law:

“ . . . 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” (3 McQuillin, *Municipal Corporations* (3d Ed. 1973), § 12.67, p. 297.)

effectively as a resignation.” (3 McQuillin, *Municipal Corporations* (3 Ed. 1973), § 12.67, p. 295, citing inter also, *People ex rel. Chapman v. Rapsey*, *supra*, 16 Cal. 2d 636.)