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OPINION	:	
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of	:	
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The Honorable John E. Thurman, Member of the California Assembly, has requested an opinion on the question we have phrased as follows:

Where the sheriff of a general law county resigns and the undersheriff acts as sheriff pursuant to Government Code section 24105 and later becomes a candidate for sheriff and is defeated in the election, does he retain his position as undersheriff?

CONCLUSION

An undersheriff in a general law county retains his position as undersheriff when he discharges the duties of the vacant office of sheriff pursuant to Government Code section 24105 or when he becomes a candidate for the office of sheriff for the next term even though he is defeated at the polls.

ANALYSIS

We are advised that the sheriff of a general law county resigned at the end of the second year of his term of office. The undersheriff discharged the duties of sheriff pursuant to section 24105.[1] The board of supervisors chose not to appoint a sheriff but allowed the undersheriff to continue as "acting sheriff" in the belief that he would retain his position as undersheriff if he were to become a candidate for sheriff for the next term of office and lose the election. We are asked whether the undersheriff would retain his position as undersheriff under these circumstances. The question presents two legal issues which will be treated separately. First, what effect did acting as sheriff pursuant to section 24105 have on his position as undersheriff Second, what effect did becoming a candidate for sheriff and losing the election have on his position as undersheriff?

The first question involves an interpretation of section 24105. That section provides:

> "If the office of any of the county officers enumerated in Section 24000 of this code is vacant the duties of such office may be temporarily discharged by a chief deputy, assistant or deputy of such officer, as the case may be, next in authority to such county officer in office at the time the vacancy occurs, with like authority and subject to the same obligations and penalties as such county officer, until the vacancy in the office is filled in the manner provided by law; provided that if the vacancy occurs in the office of sheriff, the duties of such office shall be discharged by the undersheriff, or if that position is vacant, by the assistant sheriff, or if that position is also vacant, by the chief deputy next in line of authority."

The principal clause of section 24105 governs' the discharge of duties of vacant county offices generally while the proviso relates specifically to the office of sheriff. The clear purpose of the proviso is to change the rules of the principal clause in the case of a vacancy in the office of sheriff. We note two basic changes in those rules:

1. The designation of the officers who are to discharge the duties of the vacant office.

2. The fact that those duties "may" be discharged by the designated officer in the principal clause while the proviso states that the designated officer "shall" perform such duties.

[1] All section references are to the Government Code unless otherwise indicated.

We note that in the principal clause the word "discharged" is qualified by the word "temporarily" while it is not so qualified in the proviso. We note also that the words "at the time the vacancy occurs, with like authority and subject to the same obligations and penalties as such county officer, until the vacancy is filled in the manner provided by law" which conclude the principal clause are not repeated or referred to in the proviso. It is not clear from the statute whether these words were meant to apply only to the principal clause or to the proviso as well. To resolve this ambiguity we resort to the rules of statutory construction.

The basic rules were summarized in *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal. 3d 222, 230, as follows:

> "We begin with the fundamental rule that a court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. In determining such intent the court turns first to the words themselves for the answer. We are required to give effect to statutes according to the usual, ordinary import of the language employed in framing them. If possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose; a construction making some words surplusage is to be avoided. When used in a statute words must be construed in context, keeping in mind the nature and obvious purpose of the statute where they appear. Moreover, the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole." (Citations and quotations omitted.)

Rules of construction more specifically applicable to the section 24105 ambiguity are set forth in *McAlpine v. Baumgartner* (1937) 10 Cal. 2d 409, 417–418 where the court stated:

> '[I]t is well established that in general, the purpose of a '*proviso'* in a statute, or in an ordinance, is to create merely an exception to the principal provision of the statute or ordinance which precedes such proviso; with the result that the principal part of the statute or ordinance thus modified remains intact excepting as it may be thus qualified. In other words, the proviso may, and usually does, limit the principal part of the statute or ordinance only as far as it expressly or impliedly purports to do so. In California Jurisprudence, volume 23, page 744, it is said that the office of a proviso 'is to explain, qualify, or restrain the operation of a preceding provision.' And it is to 'be read in the light of subject-matter' of the act. (*People v. Morrill*, 26 Cal. 336, 355.) Also, in *Dufton v. Daniels,* 190 Cal. 577, 580 [213 Pac. 949], it is said, 'The language of the section is plain and unambiguous, and it is not necessary

> to invoke the settled rule of construction that an exception contained in a statute to a general rule laid down therein is to be strictly construed (Black on Interpretation of Laws, p. 275; Lewis Sutherland on Statutory Construction, 2d ed., sec. 352). . . . .' And further, in the case of *Forbes v. City of Los Angeles*, 101 Cal. App. 781, 788 [282 Pac. 528], it is said: 'Where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception, must establish it as being within the words as well as within the reason thereof.' (*United States v. Dickson*, 40 U.S. [15 Pet.] 141 [10 L. Ed. 6891.)"

Applying these rules of construction to section 24105 we note first that the proviso should be construed strictly and takes no case out of the principal clause which does not fall fairly within its terms. The purpose of the proviso is merely to create an exception to the principal clause with the result that the principal clause thus modified remains intact except as it is thus qualified. The principal clause of section 24105 is therefore 'applicable to all vacant county offices, including the office of sheriff, except as the proviso expressly provides otherwise. This means that the word "temporarily" and the concluding language of the principal clause are applicable to vacancies in the office of sheriff. So construed the effect of the proviso is to make the two express changes in the application of the principal clause to a vacancy in the office of sheriff.

Returning to the first part of the question, when the sheriff resigned it became the duty of the undersheriff to perform the duties of sheriff until the vacancy was filled in the manner provided by law. This duty arose by virtue of the requirements of section 24105. This duty was mandatory because of the word "shall" contained in the proviso. Shall is to be construed as mandatory. (§ 14.) The board of supervisors' designation of the undersheriff as the "acting sheriff," though descriptive of the duties he was discharging under section 24105, was ineffectual in conferring any additional authority on the undersheriff because the board had no authority to fill the vacancy on a temporary basis.

Their authority is to fill the vacancy by the appointment of a new sheriff who will hold office for the balance of the term. (§ 25304.) Discharge of the duties of the office until the vacancy is filled by appointment or election and qualification is governed by section 24105 without any action by the board of supervisors.

Under section 24105, as we construe it, when the office of sheriff is vacant, the duties of sheriff are "temporarily" discharged by the undersheriff "until the vacancy in the office is filled in the manner provided by law," Section 24105 does not purport to make

the undersheriff the sheriff when the sheriff's office becomes vacant; it merely gives the undersheriff the authority and duty as undersheriff to perform the duties of sheriff while the sheriff's office remains vacant. The vacancy in the office of sheriff may be filled only by an appointment of a new sheriff pursuant to section 25304 who, on qualification, will hold office for the balance of the term, or by the election of a new sheriff for the next term and his qualification to serve when the new term commences. Thus the undersheriff retains his position as undersheriff while he is performing the duties of sheriff pursuant to section 24105.

The second part of the question presented is whether the undersheriff retains his position as undersheriff if he becomes a candidate for election to the office of sheriff for the next term and is defeated at the election.

In *Fort v. Civil Service Com.* (1964) 61 Cal. 2d 331, 334, the court stated:

> "Although . . . one employed in public service does not have a constitutional right to such employment [citation) it is settled that a person cannot properly be barred or removed from public employment arbitrarily or in disregard of his constitutional rights."

On pages 337–338 of the same case the court added:

> "The principles set forth in the recent decisions do not admit of wholesale restrictions on political activities merely because the persons affected are public employees, particularly when it is considered that there are millions of such persons. It must appear that restrictions imposed by a governmental entity are not broader than are required to preserve the efficiency and integrity of its public service.

In *Bagley v. Washington Township Hospital Dist.* (1966) 65 Cal. 2d 499, 509, the court held that former section 3205's proscription against a local agency employee's participation in any campaign for or against any candidate, except himself, for an office of the local agency was unconstitutional because of overbreadth. Even former section 3205 did not prohibit the employee from becoming a candidate himself. The Bagley court pointed out that a statute prohibiting an employee from running against his superior officer would be constitutional. (*Id*., at p. 508.) But the statute which was enacted in 1976 and replaced former section 3205 contains no such prohibition

The political activities of public employees are governed by chapter 9.5, division 4, title 1 (§§ 320 1–3209) of the Government Code added by chapter 465, Statutes 1976. Section 3203 provides:

"Except as otherwise provided in this chapter, or as necessary to meet requirements of federal law as it pertains to a particular employee or employees, no restriction shall be placed on the political activities of any officer or employee of a state of local agency."

Section 3204 provides:

"No one who holds, or who is seeking election or appointment to, any office or employment in a state or local agency shall, directly or indirectly, use, promise, threaten or attempt to use, any office, authority, or influence, whether then possessed or merely anticipated, to confer upon or secure for any individual person, or to aid or obstruct any individual person in securing, or to prevent any individual person from securing, any position, nomination, promotion, or change in compensation or position, within the state or local agency, upon consideration or condition that the vote or political influence or action of such person or another shall be given or used in behalf of, or withheld from, any candidate, officer, or party, or upon any other corrupt condition or consideration. This prohibition shall apply to urging or discouraging the individual employee's action."

Section 3205 provides:

"An officer or employee of a local agency shall not, directly or indirectly, solicit political funds or contributions, knowingly, from other officers or employees of the local agency or from persons on the employment lists of the local agency. Nothing in this section prohibits an officer or employee of a local agency from communicating through the mail or by other means requests for political funds or contributions to a significant segment of the public which may include officers or employees of the local agency."

Section 3206 provides:

"No officer or employee of a local agency shall participate in political activities of any kind while in uniform."

Section 3207 provides:

"Any city, county, or city and county charter or, in the absence of a charter provision, the governing body of any local agency and any agency not subject to Section 19251 by establishing rules and regulations, may prohibit or otherwise restrict the following:

"(a) Officers and employees engaging in political activity during working hours.

"(b) Political activities on the premises of the local agency."

Section 3302 in the Public Safety Officers Procedural Bill of Rights Act provides:

"(a) Except as otherwise provided by law, or whenever on duty or in uniform, no public safety officer shall be prohibited from engaging, or be coerced or required to engage, in political activity.

"(b) No public safety officer shall be prohibited from seeking election to, or serving as a member of, the governing board of a school district."

Nothing in state law prohibits an undersheriff from becoming a candidate and campaigning for the office of sheriff. However, section 3203 refers us to federal law and section 3207 authorizes enactment of local ordinances regarding political activities of public employess.

In respect to local ordinances we note first that the authority of a local agency to enact an ordinance governing the political activities of its officers and employees is limited to proscribing political activity during working hours or on the premises of the local agency. Section 3201 provides:

"The Legislature finds that political activities of public employees are of significant statewide concern. The provisions of this chapter shall supersede all provisions on this subject in the general law of this state or any city, county, or city and county charter except as provided in Section 3207."

Thus, except as authorized by section 3207 state law has preempted the field of local regulation of political activity by employees of local public agencies.

The federal Hatch Act (5 U.S.C. § 1502) applies to state and local officers and employees whose principal employment is in connection with an activity which is financed in whole or in part by federal funds. The prohibition against such an employee from becoming a candidate for elective office (5 U.S.C. § 1502(a)(3)) does not apply to a nonpartisan office. (5 U.S.C. § 1503.) Since the office of sheriff is nonpartisan (Elec. Code, § 37) the Hatch Act does not prohibit an undersheriff from becoming a candidate for that office.

We conclude chat an undersheriff has the right to become a candidate for the office of sheriff. Such candidacy, the campaign of conducted in accordance with the

applicable statutes and ordinances), and the election results do not affect his position as undersheriff or provide any basis for his removal from that position.

We do not consider whether the undersheriff may be removed from his position upon some other basis, such as his removal or reassignment by the appointing authority as may be permitted by local ordinance.

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