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OPINION	:	No. 82-203
of	:	MAY 13, 1982
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THE HONORABLE CLAIR A. CARLSON, COUNTY COUNSEL, SANTA CRUZ COUNTY, has requested an opinion on the following questions:

1. The Santa Cruz County Superintendent of Schools, who was elected to a four-year term commencing in January 1979, is the employer and appointing authority for all classified civil service employees in his office. The current memorandum of understanding entered into between the superintendent's office and his classified employees relating to wages, hours and conditions of employment remains in force until June 30, 1983, but is subject to modification with respect to employee salaries. Does section 1090 of the Government Code prohibit the superintendent from agreeing to modify the current memorandum of understanding, or entering into a new one should he be reelected, in view of his marriage to a classified employee in his office in August 1981, whose tenure with his office commenced in November 1980?

2 Do the provisions of the California Fair Employment and Housing Act which prohibit discrimination in employment because of marital status preclude a finding of conflict of interest with respect to the superintendent of schools and his wife?

CONCLUSIONS

1. Section 1090 of the Government Code does not prohibit the Santa Cruz County Superintendent of Schools from agreeing to modify the current memorandum of understanding between his office and the classified employees of his office, nor does it prohibit him from entering into a new memorandum of understanding should he be reelected. As to the current memorandum of understanding, the "rule of necessity" would be applicable. As to a new memorandum of understanding should he be reelected, the "non-interest" exception to section 1090 of the Government Code contained in section 1091.5, subdivision (a)(6) would be applicable at such time.

2. The California Fair Employment and Housing Act, insofar as it prohibits discrimination in employment because of marital status, does not prohibit a finding of conflict of interest with respect to the superintendent of schools and his wife.

ANALYSIS

Santa Cruz County has an elective county superintendent of schools (hereinafter "superintendent"). (See, Cal. Const., art. IX, § 3.) The present superintendent was elected for a four-year term on November 7, 1978, and he assumed office in January 1979.

In Santa Cruz County the superintendent is the employer and appointing power for the employees assigned to his office. Such employees are classified civil service employees.[1] On August 9, 1981, the superintendent married a classified employee who

[1] Pursuant to the provisions of Education Code section 1310 et seq., the board of supervisors may provide by ordinance that employees assigned to the office of the county superintendent of schools shall cease to be county employees. Instead, they are to be employed by the county superintendent of schools upon the establishment of a separate budget for that office. Non-certificated employees such as the superintendent's wife herein are thereafter employed in accordance with the provisions of sections 44000 et seq. and 45100 et seq. of the Education Code. (Ed. Code, § 1311.) If the county has a merit system, the law requires that the office of the superintendent of schools also have a merit system. (Ed. Code, § 1317.) This is the case in Santa Cruz County. Under the county's merit system rules the superintendent is defined in section 1.100 to be the "appointing power."

serves as a secretary to a lower management employee. His wife, who accordingly does not serve under his direct supervision, was initially hired in November 1980 and acquired permanent civil service status six months later.

The present Memorandum of Understanding (hereinafter "MOU") entered into between the superintendent's office and the employees of his office pursuant to the Rodda Act (Gov. Code, § 3540 et seq.) relating to wages, hours of employment, and other terms and conditions of employment remains in force until June 30, 1983. However, by its terms, it is subject to modification with respect to salary for fiscal years 1981-82 and 1982-83.

The first question presented is whether section 1090 of the Government Code prohibits the superintendent from agreeing to modify the current MOU, or prohibits him from entering into a new one should he be reelected, while his wife continues in her civil service employment.

It is the conclusion of this office that section 1090 prohibits neither of these official actions by the superintendent despite his wife's continued employment. As to the current MOU, we conclude that the "rule of necessity" would apply. As to a new MOU should he be reelected, we conclude that the "non-interest" exception to section 1090 of the Government Code contained in section 1091.5, subdivision (a)(6) would apply at such time.

Section 1090 et seq of the Government Code, which proscribes contractual conflicts of interest, provides:

> "Members of the Legislature, state, *county*, district, judicial district, and city *officers* or employees *shall not be financially interested in any contract made by them in their official capacity*, or by any body or board of which they are members. . . ." (Emphasis added.)[2]

For purposes of bargaining under the Rodda Act (Gov. Code, § 3540 et seq.) the county superintendent of schools is also designated as the "employer" of the affected employees in his office. (Gov. Code, § 3540.1., subd. (k).)

[2] It is to be noted that the courts do not give a technical meaning to the "making" of the contract, but include participation therein short of the actual execution of the contract. (See, *Stigall* v. *City of Taft* (1962) 58 Cal.2d 565; *City of Imperial Beach* v. *Bailey*, *supra*, 103 Cal.App.3d 191, 193; *Millbrae Ass'n for Residential Survival* v. *City of Millbrae* (1968) 262 Cal.App.2d 222.)

We also note parenthetically the inapplicability of other conflict of interest statutes applicable to local officials. Section 1126 of the Government Code which prohibits a local officer or employer from engaging in conflicting *outside* activities for compensation is facially inapplicable

Section 1091 of the Government Code then sets forth a number of "remote interests" which will remove the officer or employee from the proscriptions of section 1090 based upon full disclosure and abstention from participation in the contract proceedings. None of the remote interests are germane to our facts herein. Additionally, section 1091.5 sets forth what may be denominated "non-interests," that is, financial interests which are specifically excepted from the proscription of section 1090. One of such non-interests is relevant to our facts. Section 1091.5, subdivision (a)(6), provides:

> "(a) An officer or employee shall not be deemed to be interested in a contract if his or her interest is any of the following:
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> ". . . . . .
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> "(6) That of a spouse of an officer or employee of a public agency in his or her spouse's employment or office holding if his or her spouse's employment or office holding has existed for at least one year prior to his or her election or appointment. . . ."

Since the superintendent's wife was hired *after* he was elected, this "non-interest" provision is facially not applicable.

With respect to section 1090, it must first be determined whether the county superintendent of schools by virtue of his duties with respect to MOU's may be said to have a *contractual* interest in his wife's employment.[3] The law is clear that such bargaining agreements are contracts. (See, *Sonoma County Organization of Public Employees* v. *County of Sonoma* (1979) 23 Cal.3d 296, 304; *Glendale City Employees' Assn., Inc.* v. *City of Glendale* (1975) 15 Cal.3d 328, 334-338; Chula *Vista Police Officers' Assn.* v. *Cole*

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and also does not apply to an *elective* officer. (See 64 Ops.Cal.Atty.Gen. 795 (1981).) Section 87100 et seq. of the Government Code which prohibits a public official from being financially interested in a government decision he either makes or influences is also not applicable since the only potential financial interest the superintendent would have would be in his wife's compensation. "Income," however, received from a public entity is excluded from the purview of these sections. (See 61 Ops.Cal.Atty.Gen. 412 (1978).)

[3] Here we would point out that a family relationship, without reciprocal financial interests, has been deemed in the past by this office as not giving rise to a legal conflict of interest. (See, e.g., 28 Ops.Cal.Atty.Gen. 168 (1956); 21 Ops.Cal.Atty.Gen. 228 (1953); compare *Kimura* v. *Roberts* (1979) 89 Cal.App.3d 871 and *Reece* v. *Alcoholic Bev. Etc. Appeals Bd.* (1976) 64 Cal.App.3d 675.)

(1980) 107 Cal.App.3d 242.) Such a contract executed by the superintendent would naturally affect the terms and conditions of his wife's employment.[4]

Accordingly, we must next determine whether the superintendent would have an inevitable and inescapable financial interest in his wife's employment by virtue of an MOU. Absent an agreement making her earnings her separate property, his wife's earnings while they are living together would be community property in which he would have an equal interest. (Civ. Code, §§ 5103, 5105, 5110, 5118.) However, even if the superintendent and his spouse entered into such an agreement, his wife's earnings, although her separate property, would still be liable for the necessaries of life of either spouse and constitute a "financial interest." (Civ. Code, §§ 5121, 5132.) The leading case, *Nielsen* v. *Richards* (1925) 75 Cal.App. 680, which is still viable law, so held.[5] It also involved a county superintendent of schools and held that such superintendent could not hire his wife as a supervising rural teacher by virtue of section 920 of the Political Code, the predecessor to section 1090 of the Government Code, despite the fact that his wife's earnings were, by agreement, considered her separate property. Therefore, so long as the superintendent and his wife continue in a normal marriage relationship, there is no way he can avoid being "financially interested" in his wife's earnings, and hence her employment, within the meaning of section 1090 of the Government Code.

The foregoing discussion has isolated the potential contractual interest and financial interest of the superintendent in his wife's employment. However, section 1090

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[4] Cf. 36 Ops.Cal.Atty.Gen. 121 (1960), hiring of civil service employees deemed "contract" within the meaning of section 1090 of the Government Code; Atty.Gen.Unpub.Op. I.L. 60-18, L.B. 366 p. 40, member of board of supervisors could not be appointed as property agent for county because of board's control of salary and terms of employment of the position.

[5] In 61 Ops.Cal.Atty.Gen. 412, *supra*, we pointed out that *Coulter* v. *Board of Education*, *supra*, 40 Cal.App.3d 445 did not affect the holding in *Nielsen* v. *Richards*. We stated (at p. 422):

> "Insofar as the court of appeal in *Coulter* did not discuss nor attempt to distinguish *Nielsen* v. *Richards*, *supra*, 75 Cal.App. 680, we note that that case involved a conflict of interest question with respect to a county superintendent of schools, not a school board member. Consequently, the case was decided under the predecessor provisions to section 1090 of the Government Code, and common law principles, and not the predecessors to the present Education Code provisions that are controlling herein. Therefore, the *Nielsen* case cannot be considered to be in direct conflict with the *Coulter* case."

Additionally, the pertinent community property law as discussed in *Nielsen* v. *Richards* remains unchanged. (See also, e.g., *Credit Bureau of Santa Monica Bay Dist., Inc.* v. *Terranova* (1971) 15 Cal.App.3d 854 for a complete discussion on this point.)

of the Government Code still requires that he actually *make* a contract in his official capacity in which he has a financial interest. (Cf. *City of Oakland* v. *California Const. Co.* (1940) 15 Cal.2d 569, 577; *People* v. *Deysher* (1934) 2 Cal.2d 141, 146, 150.) We are not informed as to when the present MOU was entered into. However, a determination thereof is not critical to the question presented which looks only to possible present or future conflicts of interest.

Critical, however, would be any *modifications* of the present MOU which would require the approval of or participation of the superintendent, and which would involve or enhance his wife's, and hence his own, financial interests. As pointed out in Attorney General's Unpublished Opinion I.L. 60-18, *supra*, the ability to control the salary or other terms of employment of an employee falls within the ambit of section 1090. (See also, *City of Imperial Beach* v. *Bailey*, *supra*, 103 Cal.App.3d 191, renegotiation of concessionaire contract; 3 Ops.Cal.Atty.Gen. 333, 334 (1944), re modifications of teachers' contracts; Atty.Gen.Unpub.Opn. I.L. 73-197, re modification of Williamson Act contracts.) In short, changes in the MOU could involve conflicts of interest with respect to the superintendent and his wife under section 1090 of the Government Code.

Does that mean that because of such eventuality, either the superintendent or his wife must resign to avoid such conflicts? In our view, the answer is no. Both may retain their public positions. The superintendent may perform his requisite duties with respect to the MOU by virtue of the "rule of necessity."

The "rule of necessity" can present an exception to conflict of interest statutes. This rule had its origin and has been primarily found and applied in cases involving courts[6] and other judicial and quasi-judicial bodies.[7] As noted in *Atkins* v. *United States* (Ct.Cl. 1977) 556 F.2d 1028, 1036:

> "The rule of necessity was a part of the English common law and has been traced back to 1430 and the Year Books . . . The rule, simply stated, means that a judge is not disqualified to try a case because of his personal interest in the matter at issue if there is no other judge available to hear and decide the case."

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[6] See, e.g., *Evans* v. *Gore* (1920) 253 U.S. 245; *Olson* v. *Cory* (1980) 27 Cal.3d 532, 537; *Mosk* v. *Superior Court* (1979) 25 Cal.3d 474, 482; Annot. 39 A.L.R. 1476.

[7] See, e.g., *Thompson* v. *City of Long Beach* (1953) 41 Cal.2d 235, 243-244; *Mennig* v. *City Council* (1978) 86 Cal.App.3d 341, 351-352; *Breckenwitz* v. *City of Santa Cruz* (1969) 272 Cal.App.2d 812, 818; *Barkin* v. *Board of Optometry* (1969) 269 Cal.App.2d 714, 719, involving a statutory application of the rule; *Sconnel* v. *Wolff* (1948) 86 Cal.App.2d 489, 493.

The rule, however, has not been restricted to judicial bodies, or administrative bodies acting judicially or quasi-judicially. It has been applied by both the courts and this office to situations where an administrative officer has been required to *contract* in his official capacity when only he was authorized to act and it was essential to the government that he act. Thus in a leading California case on the "rule of necessity," *Caminetti* v. *Pac. Mutual Ins. Co.* (1943) 22 Cal.2d 344, the insurance commissioner was appointed conservator of Pacific Mutual, an insolvent insurer, pursuant to statutory authority. As conservator, the court held that he was permitted to make contracts with respect to Pacific Mutual despite the fact that he personally held policies with such company. The court deemed the "rule of necessity" to be applicable despite the proscription of section 920 of the Political Code, the predecessor to section 1090 of the Government Code. The court reasoned:

> "The sole question in the present case is whether section 920 precluded the commissioner from making contracts relating to Pacific Mutual, *for it must be conceded that persons may hold the office of commissioner although they own policies in companies subject to the act*. (Prior to 1941 section 12901 of the Insurance Code provided 'An officer, agent, or employee of an insurer is not eligible to the office of commissioner,' but it did not render anyone ineligible because of ownership of policies, and in 1941 the section was clarified to specifically permit such ownership.) *The Legislature has directed that certain provisions of the Insurance Code, including the sections authorizing voting trusts and rehabilitation agreements are to be carried into effect by the commissioner. If the commissioner were disqualified to act with respect to delinquent insurers in which he holds policies, such insurers and their creditors and policyholders would be deprived of many benefits of the code. No other officer is authorized to perform the commissioner's duties, and if he cannot act, his agents or deputies would likewise be disqualified. In such a situation it must be assumed that the Legislature intended that the commissioner act regardless of the possibility that he might hold policies in the delinquent company.* [25] As said in 42 American Jurisprudence 312 'There is an exception, based upon necessity, to the rule of disqualification of an administrative officer. An officer, otherwise disqualified, may still act, if his failure to act would necessarily result in a failure of justice.' The rule of necessity has been applied in this state to members of municipal bodies charged with hearing protests in connection with street assessments. (*Federal Construction Co.* v. *Curd*, 179 Cal. 489 [177 P. 469, 2 A.L.R. 1201]; cf. *Nider* v. *Homan*, 32 Cal.App.2d 11, 17 [89 P.2d 136].) The rule

is not confined to officers exercising quasi-judicial functions. . . ." (Emphasis added.)[8]

With respect to contractual conflicts of interest, the "rule of necessity" may be said to have two facets. The first, which is not involved herein, arises to permit a governmental agency to acquire an *essential* supply or service despite a conflict of interest. The contracting officer, or a public board upon which he serves, would be the sole source of supply of such essential supply or service, and also would be the only official or board permitted by law to execute the contract. Public policy would authorize the contract despite this conflict of interest. (See 59 Ops.Cal.Atty.Gen. 604, 619 n. 18, and opinions cited therein.) The second facet of the doctrine, exemplified in *Caminetti* v. *Pac. Mutual Ins. Co.*, *supra*, arises in nonprocurement situations and permits a public officer to carry out the essential duties of his office despite a conflict of interest where he is the only one who may legally act. It ensures that essential governmental functions are performed even where a conflict of interest exists.[9]

Reasoning from the *Caminetti* case, and the principles stated therein, we believe the superintendent is qualified to act with respect to his employees in cases where only he can legally act, such as with respect to the MOU. Otherwise, no action could *or would be taken*. *All* of the employees of his office would then be denied the benefits of collective bargaining under the Rodda Act or the benefits which might be derived from wage adjustments under the current memorandum of understanding. The need for the application of the "rule of necessity" in such cases is patent.

It might be urged, however, that the "rule of necessity" should not be applied to our facts herein because the superintendent caused his own "conflict" by marrying an employee in his office. Our research has disclosed no such limitation upon the rule. Furthermore, the application of such a limitation would mean that the superintendent should resign to both avoid the conflict and assure that essential governmental functions will continue to be performed.[10]

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[8] See also, e.g., *Gonsalves* v. *City of Dairy Valley* (1968) 265 Cal.App.2d 400, 404 (financial interest in use permit) and discussions of the doctrine and the case law in 61 Ops.Cal.Atty.Gen. 250-255 (1978) and 59 Ops.Cal.Atty.Gen. 604, 615-617 (1976).

[9] This facet of the doctrine is codified in the Political Reform Act of 1974 in section 87101 and implemented by administrative regulations explaining "legally required participation" for purposes of that act in title 2, California Administrative Code, section 18701. For more complete discussions of this doctrine and the case law, see 61 Ops.Cal.Atty.Gen. 250-255 (1978); 59 Ops.Cal.Atty. Gen. 604, 615-617 (1976).

[10] One might also urge that, alternatively, his wife should resign to avoid any conflict. We reject such an alternative for several reasons. First of all, any conflict which might arise under

We believe, however, that at least under the facts herein, the superintendent need not resign. First of all, as an elective official, he has been placed in office by the people. The electorate have a right to expect that he will serve unless he voluntarily resigns from office or is removed from office under clearly established procedures for removal (e.g., recall by the electorate, see Elec. Code, § 27000 et seq., or removal for willful or corrupt misconduct in office, Gov. Code, § 3060 et seq.). Secondly, the *fact* of marriage to an employee in his office constitutes neither a disqualification for running for such office nor from continuing in office. (See Ed. Code, § 1207.) And finally, since the United States Supreme Court has recognized that the "freedom to marry has long been recognized as one of the vital personal rights to an orderly pursuit of happiness by free men" and that "[m]arriage is one of the 'basic civil rights of men,' fundamental to our very existence and survival" (*Loving* v. *Virginia* (1967) 388 U.S. 1, 12), we should avoid an interpretation of the law which could be construed as an impediment to, and a punitive measure taken because of, marriage. (See also, *Zablocke* v. *Redhail* (1978) 434 U.S. 374 firmly establishing a constitutional right to marriage.) The "rule of necessity" permits us to avoid such a construction.

Finally with respect to question one, we turn to the possibility of the superintendent entering into a new MOU with his classified employees should he be reelected this year and commence a new term in January 1983. The foregoing reasoning would be equally applicable to a new MOU. However, because of the provisions of section 1091.5, subdivision (a)(6) there would be no need to apply the "rule of necessity." It is to be recalled that that provision states that an officer or employee is not interested in an employment contract of his or her spouse within the meaning of section 1090 "if his or her spouse's employment or officeholding has existed for at least one year prior to his or her election or appointment." Although the provision was not applicable during the superintendent's present term, since his wife had been hired after he was elected, it would clearly apply to his election to a new term.

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section 1090 of the Government Code would be with respect to the superintendent's official action, not his wife's. Accordingly, she should not be required to resign when she herself would be doing nothing legally wrong where only *he* has acted. Secondly, she is a permanent civil service employee. As such she has the right to be terminated only in accordance with the "Merit System Rules for Classified Employees of the Santa Cruz County Office of Education," sections 6.600 et seq.

In this respect, we note that in Attorney General's Unpublished Opinion I.L. 76-209 it was concluded that a state agency, consistent with the State Civil Service Act, could establish a rule to bar close relatives either by blood or marriage from working in the same agency in positions which could foster favoritism. Such an "anti-nepotism" rule has not been adopted in Santa Cruz County with respect to employees of the superintendent of schools.

The second question presented is whether the provisions of the California Fair Employment and Housing Act which prohibit discrimination in employment by reason of marital status would preclude the application of conflict of interest laws to the superintendent and his wife.

The California Fair Employment and Housing Act is contained in section 12900 et seq. of the Government Code. Section 12940, subdivision (a) and subdivision (a)(3) contain the pertinent legal provisions. They state:

> "It shall be unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:
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> "(a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, or sex of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge such person from employment or from a training program leading to employment, or to discriminate against such person in compensation or in terms, conditions or privileges of employment.
>
> ". . . . . .
>
> "(3) Nothing in this part relating to discrimination on account of marital status shall either (i) affect the right of an employer to reasonably regulate, for reasons of supervision, safety, security, or morale, the working spouses in the same department, division, or facility, consistent with the rules and regulations adopted by the commission. . . ."

The Fair Employment and Housing Commission has adopted administrative regulations which are contained in sections 7286.3 through 7296.4 of title 2 of the California Administrative Code. As pertinent to our inquiry, subchapter 7 of such regulations (§§ 7292.0-7292.6) applies to "marital status discrimination."

Section 7292.5 of these regulations provides:

"7292.5. Employee Selection.

"(a) Employment of Spouse. An employment decision shall not be based on whether an individual has a spouse presently employed by the employer except in accordance with the following criteria:

"(1) For business reasons of supervision, safety, security or morale, an employer may refuse to place one spouse under the direct supervision of the other spouse.

"(2) For business reasons of supervision, security or morale, an employer may refuse to place both spouses in the same department, division or facility if the work involves *potential conflicts of interest* or other hazards greater for married couples than for other persons.

"(b) Accommodation for Co-Employees Who Marry. If co-employees marry, an employer shall make reasonable efforts to assign job duties so as to minimize problems of supervision, safety, security, or morale." (Emphasis added.)

It is clear that *these* laws and regulations do not preclude the application of conflict of interest laws.[11]

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[11] It is significant to note that at least two California cases have sanctioned what may arguably be called "marital status discrimination" where conflicts of interest were involved. (See, *Kimura* v. *Roberts*, *supra*, 89 Cal.App. 3d 871, 874, wife properly removed from planning commission when husband elected to city council because of pervasive conflict of interest.) "It was the *act* of her husband in seeking out the office of city councilman and the *fact* that he was elected to that office which triggered the removal mechanism. It was not the act of marriage or Kimura's status of being married, as such."; *Reece* v. *Alcoholic Bev. Etc. Appeals Bd.* (1976) 64 Cal.App.3d 675, rule which prohibited wife of sheriff's department inspector as well as inspector himself from owning liquor license held constitutional because of potential "conflicts of interest."

With respect to federal law, and cases under Title VII of the Federal Civil Rights Act on "sex discrimination" (42 U.S.C.A. § 2000e) which found no legal employment "discrimination" by reason of employer's "no spouse" rule, see, e.g. *Harper* v. *Trans World Airlines, Inc.* (8th Cir. 1975) 525 F.2d 409; *Yuhas* v. *Libbey-Owens-Ford Co.* (7th Cir. 1977) 562 F.2d 496, 498-500.