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OFFICE OF THE ATTORNEY GENERAL
State of California

JOHN K. VAN DE KAMP
Attorney General

OPINION	:	No. 84-206
	:	
of	:	<u>AUGUST 1, 1984</u>
	:	
JOHN K. VAN DE KAMP	:	
Attorney General	:	
	:	
CLAYTON P. ROCHE	:	
Deputy Attorney General	:	
	:	

THE HONORABLE TOM BANE, MEMBER OF THE CALIFORNIA ASSEMBLY, has requested an opinion on the following questions:

1. May the offices of city attorney and president and board member of an airport authority, a joint exercise of powers agency of which the city is a member, be held simultaneously by the same individual?
2. Is there an "appearance of impropriety" when the same individual holds these offices simultaneously?

CONCLUSION

1. Under the provisions of section 1128 of the Government Code the office of appointive city attorney and president and board member of the subject airport authority may be held simultaneously by the same individual.

2. There is no "appearance of impropriety" since the holding of these two offices at the same time is now legally sanctioned by the provisions of section 1128 of the Government Code.

ANALYSIS

The city attorney involved herein was appointed to that office in 1982. Prior thereto he had been appointed to the office of board member of an airport authority, a joint exercise of powers agency, of which his city is a member. He is currently president of the authority. The authority is a separate entity from its members.

1 The first question presented is whether these two offices may be held simultaneously.¹ The question assumes the offices would be incompatible under common law principles. Likewise the request itself demonstrates that the city and the authority have had interrelationship which would preclude the holding of the offices simultaneously by the same individual under common law principles.² As noted in 66 Ops.Cal.Atty.Gen. 382, 383 (1983), quoting from an earlier opinion of this office:

"Offices are incompatible, *in the absence of statutes suggesting a contrary result*, if there is any significant clash of duties or loyalties between the offices, if the dual office holding would be improper for reasons of public policy, or if either office exercises a supervising, auditory, or removal power over the other." (38 Ops.Cal. Atty.Gen. 113 (1961).)" (Emphasis added.)

In 66 Ops.Cal.Atty.Gen. 382, *supra*, we discussed the statute "suggesting a contrary result" in detail, and which provides a complete answer to question one herein. That statute is section 1128 of the Government Code. It provides:

"Service on an appointed or elected governmental board, commission, committee, or other body by an attorney employed by a local agency in a nonelective position shall not, *by itself*, be deemed to be inconsistent, incompatible, in conflict with, or inimical to the duties of the attorney as an officer or employee of the local agency and shall not result in the automatic vacation of either such office." (Emphasis added.)

¹ There is no question but that a city attorney holds an office. See, e.g., 66 Ops.Cal.Atty.Gen. 382, 383, fn. 2 (1983). Likewise, a joint exercise of powers agency may be an entity separate from its members. Its president and governing board would also clearly hold "offices" and be officers by virtue of the powers they would necessarily yield.

² The request points out that recently an agreement was reached modifying the manner in which parking fines are distributed as between the airport authority and the city.

Reference is made to that opinion for a complete discussion of the background of section 1128, which was effective January 1, 1982, and accordingly is applicable to the appointive office of city attorney involved herein.

Suffice it to say that we concluded in that opinion that 1) it was immaterial which office was first assumed insofar as section 1128 was concerned and 2) that unlike the common law rule, where the assumption of the second incompatible office works an automatic forfeiture of the first office, section 1128 does not provide for *any* forfeiture of office. It contemplates that when a conflict arises as between the duties or loyalties of the two offices held, the officer will appropriately abstain. We thus stated:

"Accordingly, we conclude that section 1128 was not intended to imply that one office is to be forfeited if actual conflict should arise. Since nothing in either the statutory law 8/ or the common law provides for forfeiture of either office when actual conflict arises, it would appear that when it does arise, the officer would be in the same position as when a 'conflict of interest' arose if he held a single office. He should disqualify himself and abstain from either acting or influencing anyone else in the matter. If abstention would require the public agency to seek outside counsel, ample authority to do so is provided for in sections 31000 and 53060, which permit contracting for 'special services' to avoid such conflict. (See generally *Montgomery v. Superior Court*, *supra*, 46 Cal.App.3d 657, 668; *California School Employees Assn. v. Sunnyvale Elementary School District* (1973) 36 Cal.App.3d 46, 60-62; *Barnett v. Hart* (1963) 223 Cal.App.2d 521, 524; *Jaynes v. Stockton* (1960) 193 Cal.App.2d 47, 54; 61 Ops.Cal.Atty.Gen. 227, 232 (1978).)" (66 Ops.Cal.Atty.Gen., *supra*, at p. 389, fn. omitted.)

It is thus clear that under the provisions of section 1128 of the Government Code the same individual may simultaneously hold the offices of appointive city attorney and president and board member of the airport authority which is the subject of this opinion.

Question two asks if there is "an appearance of impropriety" where the same individual holds these offices simultaneously. (See generally 64 Ops.Cal.Atty.Gen. 282 (1981); 62 Ops.Cal.Atty.Gen. 546 (1979); and State Bar Formal Opn. No. 1981-63 discussing *pre*-1982 law with respect to possible conflicts under State Bar Rules, American Bar Association Rules, and case law where an attorney also holds a local public office such as held here.)

We conclude in response to question two that there is no "appearance of impropriety" since the holding of these two offices at the same time is now legally sanctioned by the provisions of section 1128 of the Government Code.
