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OPINION	:	No. 86-401
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of	:	<u>NOVEMBER 4, 1986</u>
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THE HONORABLE BYRON D. SHER, Member of the California Assembly, has requested an opinion on the following question:

Where the spouse of a school board member has been employed by the school district for several years before the board member's election or appointment, would section 1090 of the Government Code prohibit the employed spouse from being promoted or from being appointed to a different employment position with the school district?

CONCLUSION

Where the spouse of a school board member has been employed by the school district for several years before the board member's election or appointment, section 1090 of the Government Code would prohibit the employed spouse from being promoted if such promotion involves any action by the board itself. It would also prohibit the spouse from being appointed to a different employment position with the school district.

## ANALYSIS

In 69 Ops.Cal.Atty.Gen. 102 (1986) we discussed at length the effect of chapter 816, Statutes of 1985, on school board members. That law repealed the special conflict of interest provisions which were found in the Education Code and which were applicable to school board members. For purposes of contractual conflicts of interest, that law made the general provisions of section 1090 et seq. of the Government Code applicable to school board members. Absent a finding of a "remote interest" (see Gov. Code section 1091) or a "noninterest" (see Gov. Code, section 1091.5), section 1090 prohibits public officers and employees from being interested in contracts made by them in their official capacity, or made by boards or commissions of which they are members.<sup>1</sup>

For a detailed comparison of the repealed laws and section 1090 et seq. of the Government Code, reference is made to the above cited opinion. Suffice it to say for our purposes herein that section 1090, where applicable, constitutes an absolute prohibition from entering into the prohibited contract by a board or commission. Accordingly, its proscriptions cannot be avoided by merely having the interested board member abstain from any participation in the making of the contract.

As noted, however, the law does permit entering into a contract where the interest of an officer or board member is either a statutorily designated "remote interest" or "noninterest". Ten "remote interests" are presently set forth in section 1091 of the Government Code. If an interest qualifies as such, and the interested officer and the board follow the procedure set forth therein, the proscription of section 1090 can be avoided. Section 1091.5 presently sets forth what can be denominated nine "noninterests". It is one of such noninterests which was the focus of our opinion in 69 Ops.Cal.Atty.Gen 102, *supra*,

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<sup>1</sup> Section 1090 provides in full:

"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. Nor shall state, county, district, judicial district, and city officers or employees be purchasers at any sale or vendors at any purchase made by them in their official capacity.

"As used in this article, 'district' means any agency of the state formed pursuant to general law or special act, for the local performance of governmental or proprietary functions within limited boundaries."

We note parenthetically that although a school board is empowered to delegate the making of contracts to the superintendent of schools, those contracts must be approved and ratified by the board itself. (See Ed. Code, §§ 35035, 39656.)

and will be the focus for our opinion herein.<sup>2</sup> Such is found in section 1091.5, subdivision (a)(6), of the Government Code. That 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:

".....

"(6) That of a spouse of an officer or employee of a public agency in his or her spouse's employment or officeholding if his or her spouse's employment or officeholding has existed for at least one year prior to his or her election or appointment."

In 69 Ops.Cal.Atty.Gen 102, *supra*, we were presented with two questions with respect to a school board member whose wife was a tenured teacher, but who commenced her employment with the school district less than a year before her spouse's election to the school board. The first question was whether the school board could enter into a new Memorandum of Understanding (collective bargaining agreement referred to as an MOU) with a teachers' association under the facts presented therein because of section 1090 of the Government Code. The second posited the question of the effect of subdivision (a)(6) of section 1091.5 if the school board member was reelected.

We concluded on the first question that since subdivision (a)(6) of section 1091.5 could not remove the MOU from the section 1090 proscription, section 1090 would literally prohibit the school board from entering into a new MOU while both spouses retained their respective public positions with the school district. However, despite this conclusion, we further concluded that the new MOU could still be entered into under the "rule of necessity". We concluded that neither spouse need resign since (1) the wife was a tenured teacher with rights to permanent employment, and (2) the public had the right to the continued services of the board member whom they had elected. Accordingly, we concluded that the school board could enter into the legally mandated MOU despite the proscription of section 1090 of the Government Code and its usual absolute prohibition as to such contracts under the "rule of necessity". On question two, we concluded that

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<sup>2</sup> None of the "remote interests" nor any of the other "noninterests" are germane herein.

We note that with respect to "remote interests" we have previously concluded that the statutory procedures still require that the interested member should abstain from any participation in the making of the contract.

Furthermore, as to "noninterests", abstention may still be required pursuant to sections 87100-87103 of the Government Code, a part of the Political Reform Act of 1974. (See 67 Ops.Cal.Atty.Gen. 369, fns. 6 and 8 (1984).)

subdivision (a)(6) of section 1091.5, *supra*, would apply if the board member were reelected because by that time his wife would have been employed by the school district for a number of years when the board member assumed his new term. (See also 65 Ops.Cal.Atty.Gen. 305 (1982).)

With this background we proceed to the question presented in this request for our opinion. We are essentially asked how subdivision (a)(6) of section 1091.5 is to be applied where the spouse of a school board member has been employed for several years with the school district and seeks a promotion or seeks a different employment position with the district.

Considering the fact that school employees can be 1) temporary, substitute, probationary or permanent employees in either 2) the certificated service or 3) the classified service, which may or may not have a merit system,<sup>3</sup> we see that the question presented could pose numerous different personnel transactions, given the various possible combinations.<sup>4</sup> No particular facts have been presented to us. However, we believe that we may still generalize within the framework of section 1090 and the relevant noninterest exception, subdivision (a)(6) of section 1091.5.

Subdivision (a)(6) of section 1091.5 of the Government Code provides an exception to the section 1090 proscription where (1) one spouse has been employed by a public agency for at least one year; (2) the second spouse then assumes an office or employment with that public agency; and (3) the second spouse enters into a contract in his or her official capacity in which he or she has a financial interest by virtue of the other spouse's employment with the public agency.

In the context of the questions presented herein, the issue resolves itself into whether the "employment" for one year or more means (1) *any* employment or (2) the same employment with the school district. If it means any employment, then there is no prohibition against a school employee being appointed to a new or different position. Subdivision (a)(6) would prevent any prohibited conflict of interest from arising under

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<sup>3</sup> See Education Code, sections 44800 et seq. re certificated employees; Education Code, sections 45100 et seq. re classified employees generally; and Education Code, sections 45240 et seq. regarding the establishment of a merit system for classified employees.

<sup>4</sup> For example, a substitute teacher could seek to become 1) a permanent certificated employee, 2) a classified employee where no merit system exists or 3) a classified employee where a merit system has been established.

A certificated employee such as a teacher 1) could seek a promotion to a supervisory administrative position, or 2) could seek a different position in the classified service with or 3) without a merit system.

section 1090. However, if the term "employment" means the same employment, then it follows that a spouse may not be employed in a different position. Section 1090 of the Government Code would literally apply.<sup>5</sup>

Research has disclosed no cases or opinions of this office which would resolve this issue. Nor has our research disclosed any legislative history regarding the addition of this noninterest provision in 1973 (Stats. 1973, ch. 414). Accordingly, we resort to certain rules of statutory construction and other principles to aid us in interpreting subdivision (a)(6) to section 1091.5 of the Government Code.

The fundamental rule of construction is to ascertain the intent of the Legislature. (*Steketee v. Lintz, William & Rothberg* (1985) 38 Cal.3d 46, 51-52.) The basic purpose of section 1090 is, of course, to prevent the making of public contracts when those participating on behalf of the public also have a personal financial interest in the contract. Additionally, the absolute prohibition as to a board or commission acting, even if the interested member abstains, has as its purpose to remove the *possibility* of any influence by the interested member on the remaining members. (See *Thomson v. Call, supra*, 38 Cal.3d 633, 648-650.)

We believe that the Legislature, in enacting subdivision (a)(6), recognized that the original employment contract with the employed spouse would have been made by a *prior, disinterested* officer or board. Accordingly, to permit a continuation of the same employment would involve little risk to the public interest despite 1) the fact that the other spouse would subsequently have a financial interest therein and 2) the fact that the other spouse, or a board upon which he or she served, might be required to take actions with respect to that employment (e.g., entering into a new MOU or renewing the contract of a tenured teacher). We additionally believe that the one year threshold requirement of the exception was placed therein to prevent the *possibility* of any influence by the spouse who would subsequently assume the interested office or employment.

Furthermore, subdivision (a)(6) constitutes an exception to section 1090 of the Government Code. "An exception contained in a statute to the general rule laid down

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<sup>5</sup> We note a possible distinction between certificated employees, who clearly have an employment contract with the school district, and classified employees, who are hired by the district for continuous employment, subject only to discharge for cause or layoff due to a necessary reduction in force.

However, it is to be noted that we have concluded that any hiring of one spouse by another spouse (or a board of which he or she is a member) falls within the proscription of section 1090 of the Government Code whether or not there is technically a contract involved. (See 68 Ops. Cal. Atty. Gen. 7, 10, fn. 2 (1985); 65 Ops. Cal. Atty. Gen. 305, 308, fn. 4 (1982).)

therein must be strictly construed." (*Marrujo v. Hunt* (1977) 71 Cal.App.3d 972, 977, and cases cited therein.) Likewise "[s]tatutes prohibiting such 'conflict of interest' by a public officer are strictly enforced" (*Terry v. Bender* (1956) 143 Cal.App.2d 198, 207; *Thomas v. Call* (1985) 38 Cal.3d 633, 650) and have been strictly construed by the courts (e.g. *Stigall v. City of Taft* (1962) 58 Cal.2d 565; *Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201, 214-215; *People v. Watson* (1971) 15 Cal.App.3d 28) to further their salutary purpose.

Accordingly, given the possible constructions of any employment or the same employment in subdivision (a)(6) of section 1091.5 of the Government Code, we choose the stricter interpretation, that is, the same employment. Thus, this subdivision does not authorize an employee who has worked for a school district for a year or more to move from one type of employment to another after his or her spouse becomes a school board member. It is only when the spouse remains in the same employment that the board member-spouse may take contract actions affecting such employment without violating the proscription of section 1090.

Accordingly, under a strict construction of subdivision (a)(6) of section 1091.5 of the Government Code a certificated employee could not move across employment lines to become an employee in the classified service. Nor could a classified employee move from one position in the classified service (e.g., accountant) to a completely different position within the classified service (e.g., attorney). Different employments and different employment contracts would be involved. (See note 3, *supra*, and the present legislative scheme embodied in the cited code sections.)

With respect to substitute teachers, a category of certificated employees of general interest,<sup>6</sup> we conclude first that section 1090 of the Government Code would not prevent the employed spouse from continuing annual employment as a substitute teacher. We believe such continued employment would constitute the same employment within our analytical framework. Although a new contract would be required each year, we still believe that subdivision (a)(6) authorizes the board to make the contract despite the member's interest. The legislative intent we find in subdivision (a)(6) of section 1091.5 is to permit a continuation of the *status quo* with respect to the spouse's employment.

However, were the spouse to attempt to become a permanent employee, whether certificated or classified, this would require the board to make a new contract

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<sup>6</sup> We assume such are substitute teachers on an annual contract and on an "on-call" basis, so that no question could arise as to such substitute teachers having a statutory right to become a probationary teacher and ultimately a permanent teacher. (See, generally, Ed. Code, §§ 44917, 44918.)

which would be prohibited by section 1090 of the Government Code. A different employment position would be involved with different employment rights. These would include such matters as the right to become a permanent classified employee after satisfactorily serving a probationary period or the right to become tenured in the certificated service. The *status quo* would clearly be disturbed by such new employment.

We now move to the second facet of the question presented, that is, promotions. May a board member's spouse be promoted when the basic employment has existed for at least one year before the board member's election or appointment? In our analytical framework the question would be, does a promotion constitute the same employment or a different employment? If the former, the answer would be in the affirmative; if the latter, the answer would be in the negative.

If a promotion involved no action by the school board itself, we believe it would qualify as the same employment. The situation which comes to mind is salary step or merit increases which usually require no action by the school board itself.

However, if, for example, a senior classroom teacher were to be "promoted" to an administrative position such as a school principal, such a promotion would be to a different employment. The decision to appoint would be that of the board itself, since a *new* contract would clearly be required. There would be no automatic renewal of the original contract such as with a tenured teacher. (See Ed. Code, §§ 35042, 44883; compare Ed. Code, §§ 44840, 44882-44890.)

Likewise in the classified service a promotion from one grade (*e.g.*, Accountant I) to a higher grade (Accountant II) would, we presume, involve significant decisional action by the board in approving the promotion. (See Ed. Code, §§ 45103, 45113, 45260, 45261, 45272.) If this is the case under the rules adopted by the particular school board, then this again would constitute a different employment under our analytical framework. A new appointment would be made by the existing (new) board and hence a new contract would be made by them within the meaning of section 1090.

It is to be recalled that we have in essence concluded that subdivision (a)(6) of section 1091.5 of the Government Code was enacted to permit a continuation of the *status quo* with respect to a board member's spouse's employment who meets the one year requirement of the subdivision. Accordingly, a *change* in that *status quo* would not fall within the apparent intent of the subdivision. The above analysis with respect to promotions recognizes this.

In sum, we conclude that where the spouse of a school board member has been employed by a school district for several years before the board member's election or

appointment, section 1090 of the Government Code would prohibit the spouse from being appointed to a different employment position with the school board. It would also prohibit the spouse from being promoted if such promotion involves any action by the board itself.<sup>7</sup>

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<sup>7</sup> We also note the inapplicability of the "rule of necessity" to a different employment. There would be no need for the board to enter into such *new* contract with the board member's spouse in order to perform its mandated statutory duties.