


KENSINGTON POLICE PROTECTION AND COMMUNITY SERVICES DISTRICT

Date: December 15, 2015, 
From: Kevin E. Hart,
Interim General Manager/Chief of Police
To: The Kensington Community
Subject: **Release of Privileged and Confidential Attorney-Client Communication**

At a Special Meeting held on December 14, 2015, the Kensington Police Protection and Community Services District Board of Directors voted to release an attorney–client privilege letter, written by Randy Riddle and Teresa Stricker of the Public Law Group.

Please see the attached letter for your reference.



Renne Sloan Holtzman Sakai
Public Law Group

1220 Seventh Street Suite 300
Berkeley, CA 94710
(510) 995-5800

Memorandum

PRIVILEGED AND CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION

To: Board of Directors, Kensington Police Protection and Community Services District

From: Randy Riddle *RR*
Teresa L. Stricker *TS*

Date: December 8, 2015

Re: Legality of Dual General Manager/Chief of Police Position

You have asked whether it is unlawful for the Kensington Police Protection and Community Services District ("District") to appoint a single person to serve as both its General Manager and Chief of Police. In connection with this request, we have been provided with the attached April 2, 2015 opinion addressing the same issue provided by the District's prior counsel.

This memorandum provides our analysis and conclusion on this question along with our thoughts about the conclusions the District's prior counsel reached.

I. SUMMARY ANSWER

In our opinion, there is no legal prohibition against one person serving the dual role as the District's General Manager and Chief of Police.

First, we conclude that the Community Service District Law ("CSD Law"), the enabling law governing the District, does not limit the District from assigning its General Manager the additional title and duties of Chief of Police.

Second, we conclude that having a single person serve as both the General Manager and Chief of Police would not violate the doctrine of incompatible offices. That doctrine is not applicable because, in our view, the Chief of Police position is not a separate public office within the meaning of the doctrine. Moreover, in our view, the General Manager and Chief of Police positions are not incompatible.

Our conclusion is consistent with the District's prior counsel's opinion that there is no legal restriction on the District's ability to appoint one individual to the dual role of General Manager/Chief of Police. While not entirely free from doubt, in our view, it is highly unlikely

Board of Directors, Kensington Police Protection and Community Services District

December 8, 2015

Page 2

that a court would reach a different conclusion notwithstanding the supervisory responsibility for all District staff the CSD Law imposes on the General Manager. And our conclusion is not altered by state statutes that preclude cities and counties – but not community service districts – from assigning their general managers as their police chiefs or sheriffs, or the fact that the District appears to be the only community service district that has assigned its General Manager as its Chief of Police.

II. BACKGROUND

As we understand it, the agency that is now the District was originally formed in 1947 as a police protection district. In 1954, the District became a community services district for the purpose of providing police protection services. In 1955, the District began providing other services as well.

In 1994, to highlight that the District's primary purpose is to provide police protection services, the Board of Directors changed the agency's name from the Kensington Community Services District to the Kensington Police Protection and Community Services District. (District Resolution 93-07.)

It is our understanding that since the 1950s, the District has had one individual serve as both its General Manager and Chief of Police. The General Manager/Chief of Police serves at the pleasure of the Board of Directors.

According to District's current job description for the General Manager/Chief of Police, with respect to the Police Department, the General Manager/Chief of Police (1) is "the chief executive officer of the department and the final departmental authority in all matters of policy, operations and discipline," (2) "is responsible for planning, directing, coordinating, controlling, training and staffing all activities of the department," "for enforcement of rules and regulations within the department," and for the preparation of required reports, (3) "sets objectives for the department, makes plans, develops procedures and organizes and re-organizes, provides for staff and equipment, adopts rules and regulations for the administration of the department, sets policy, coordinates efforts and relationships, reports on departmental accomplishments, maintains public and employee relationships, develops the budget, directs departmental training activities, controls personnel files," investigates "citizen complaints regarding actions of officers, performs performance evaluations," and "provides direction to the department," and (4) conducts investigations, prepares reports, and testifies in court.

Board of Directors, Kensington Police Protection and Community Services District
December 8, 2015
Page 3

III. ANALYSIS

A. **The Community Services District Law Does Not Preclude the District from Combining Its General Manager and Chief of Police Positions**

The CSD law does not prevent the District from appointing one person to fulfill the combined roles of General Manager and Chief of Police.

The CSD Law explicitly requires the District to appoint a general manager who serves at the pleasure of the Board of Directors. (Gov. Code § 61050.) The CSD Law makes the District's General Manager responsible for (1) "[t]he implementation of the policies established by the board of directors for the operation of the district," (2) "[t]he appointment, supervision, discipline, and dismissal of the district's employees, consistent with the employee relations system established by the board of directors," (3) "[t]he supervision of the district's facilities and services," and (4) "[t]he supervision of the district's finances." (*Id.* § 61051.)

The CSD Law further authorizes the District to provide for police protection services "by establishing and operating a police department that employs peace officers" who meet the state's qualifications for all peace officers. (Gov. Code § 61100(i).) But even where a community service district provides police protection services, the CSD Law does not require the district to appoint a chief of police. And although state statutes require *cities* to appoint a police chief and *counties* to appoint a sheriff, those statutes have no application to community service districts. (See Gov. Code § 2400 [counties]; §§ 3501, 3605 [general law cities].)

Further, none of the provisions of the CSD Law expressly limit a community service district's general manager from simultaneously serving as the district's police chief or performing any district police duties himself or herself, so long as the general manager meets the state's peace officer qualifications and fulfills his or her statutory duties as general manager. And no judicial or Attorney General opinion has construed the CSD Law to impose such limits on a community service district's general manager. Accordingly, we conclude that the CSD Law does not limit the District's General Manager from also serving as the District's Chief of Police.

Finally, the CSD Law expressly permits a community service district to appoint its general manager to also serve as its treasurer, should the district's board of directors choose to appoint a treasurer rather than have the county treasurer serve as the district's treasurer. (Gov. Code § 61050.) This legislative grant of flexibility to community service districts to satisfy their staffing needs within their often considerable budgetary constraints by appointing their general managers to dual positions reinforces the conclusion that the CSD Law was not intended to prohibit the District's General Manager from simultaneously serving as its Chief of Police.

Board of Directors, Kensington Police Protection and Community Services District
December 8, 2015
Page 4

B. The Incompatible Offices Doctrine Does Not Preclude a Single Individual from Serving as the District's General Manager and Chief of Police.

Section 1099 of the Government Code codified the common law doctrine of incompatible offices. (Gov. Code § 1099(f).) That doctrine precludes a person from holding simultaneously two public offices if the performance of the duties of either office could have an adverse effect on the other. (74 Ops.Cal.Atty.Gen. 82 (1991), 1991 WL 495459 at p. *1.) Under the doctrine, a public officer who accepts a second public office automatically vacates the first office if the two are incompatible. (Gov. Code § 1099(b); *People ex rel. Chapman v. Rapsey* (1940) 16 Cal.2d 636, 644.)

In our view, while the question is not free from doubt, the doctrine of incompatible offices does not preclude one person from serving as both the General Manager and Chief of Police for the District for two independent reasons. First, because the position of Chief of Police is not a public office within the meaning of the doctrine, the doctrine does not apply. Second, even if the doctrine applied, we conclude that the General Manager and Chief of Police positions are not incompatible within the meaning of the doctrine.

1. Because the Chief of Police Position Is Not a "Public Office" within the Meaning of the Doctrine, the Doctrine Does Not Apply.

The doctrine of incompatible offices applies where both positions are "public offices" within the meaning of the statute. If one or both of the positions is a position of employment, and not a public office, the doctrine does not apply. (Gov. Code § 1099 (c).) Because, in our view, the Chief of Police position is not a separate public office, the doctrine does not bar the General Manager from serving simultaneously as the Police Chief.

For purposes of the doctrine, "a public office is a position in government, (1) which is created or authorized by the Constitution or by law; (2) the tenure of which is continuing and permanent, not occasional or temporary, (3) in which the incumbent performs a public function for the public benefit and exercises some of the sovereign powers of the state." (68 Ops.Cal.Atty.Gen. 337 (1985) 1985 WL 167494 at p *5.) A public office may be created under local legislation. (See e.g. 82 Ops.Cal.Atty.Gen. 201 (1999) [fire chief position established under city charter and city administrator position established under by city ordinance are both public offices].)

The question of whether a public employee exercises sufficient sovereign powers to constitute a public office within the meaning of the doctrine of incompatibility is not always straightforward. As one court has explained:

If specific statutory and independent duties are imposed upon an appointee in relation to the exercise of the police powers of the

Board of Directors, Kensington Police Protection and Community Services District
December 8, 2015
Page 5

State, if the appointee is invested with independent power in the disposition of public property or with the power to incur financial obligations upon the part of the county or State, if he is empowered to act in those multitudinous cases involving business or political dealings between individuals and the public, wherein the latter must necessarily act through an official agency, then such functions are a part of the sovereignty of the State.

(*Schaefer v. Superior Court* (1952) 113 Cal.App.2d 428, 432-433.) But not every public employee with the duty or power to exercise some part of a sovereign's powers is an officer within the meaning of the doctrine of incompatible offices. (See *Neigel v. Superior Court* (1977) 72 Cal.App. 3d 373 [police officer does not hold a public office]; 78 Ops.Cal.Atty.Gen. 362 (1995) [sheriff's deputy chief does not hold a public office]; 74 Ops.Cal.Atty.Gen. 82 (1991) [city fire division chief does not hold a public office]; 82 Ops.Cal.Atty.Gen. 83 (1999) [city's community development director does not hold a public office].)

Neigel v. Superior Court (1977) 72 Cal.App.3d 373, is instructive. There, the court considered whether a city police officer held a public office within the meaning of the incompatible offices provision incorporated into the city's charter. Although the police officer had the duty and power to exercise a part of a sovereign's governmental powers, the court concluded that the officer did not hold a public office because (1) the officer's duties were not prescribed by the charter, (2) he was not "clothed with policy-making authority," and (3) he did not serve for a term or at the pleasure of the appointing authority. (*Id.* at p. 378.)

In reaching this conclusion, the court expressly rejected the argument that because police officers are public officers for some purposes, they are also public officers for purposes of the incompatibility of office doctrine:

The city relies on cases holding that a policeman falls within the category of a public officer because he is entrusted with the duty and power to exercise a part of the sovereign governmental powers of the entity for which he is acting. (*Logan v. Shields*, 190 Cal. 661, 664-665; *Estrada v. Indemnity Ins. Co.*, 158 Cal.App.2d 129, 134-135; *Brown v. Boyd*, 33 Cal.App.2d 416, 422; *Noble v. City of Palo Alto*, 89 Cal.App. 47, 52.) However, the fact that policemen have been held to be public officers for certain purposes does not lead inevitably to the conclusion that they are 'officers' for all purposes. (*Davis v. Kendrick*, 52 Cal.2d 517, 519.) The meaning of the words 'officer' or 'official' varies with the conditions and circumstances in which they are used. (*Davis v. Kendrick, supra*, 52 Cal.2d 517, 519; *Pockman v. Leonard*, 39 Cal.2d 676, 683, app.

Board of Directors, Kensington Police Protection and Community Services District
December 8, 2015
Page 6

dism., 345 U.S. 962; *Martin v. Riley*, 20 Cal.2d 28, 34; *Estrada v. Indemnity Ins. Co.*, *supra*, 158 Cal.App.2d 129, 134.)

(*Id.* at p. 378.)

In reliance on *Neigel*, the Attorney General concluded that even where a city's municipal code granted its community development director the sovereign power to issue code enforcement citations, the community development director did not hold a public office for purposes of the incompatibility of offices doctrine. (82 Ops.Cal.Atty.Gen. 83 (1999).) The Attorney General reasoned:

The director's formal job description indicates that he exercises managerial functions for the city under the supervision and direction of the city manager. Such managerial functions and supervision are indicative of an employment relationship rather than the holding of a public office. (78 Ops.Cal.Atty.Gen., *supra*, at 368, 1995 WL 767221.) Moreover, the director holds a civil service classification with the city as did the police officer in *Neigel v. Superior Court*, *supra*, 72 Cal.App.3d at 373. He does not serve a definite "term" or at the pleasure of the appointing authority, and his policy-making authority is limited by the conditions of his job description and his subordination to the city manager,

(82 Ops.Cal.Atty.Gen. 83, 1999 WL 236160 at p. *3.)

Here, although there is no question that the District's General Manager is a public office within the meaning of the incompatibility of offices doctrine, we conclude that the Chief of Police position is not a separate public office.

First, just as the city charter at issue in *Neigel* did not prescribe police officer's duties, the CSD Law does not mention – much less require the appointment of, or prescribe the duties for – a community services district police chief.

Second, as we understand it, the District itself has never adopted legislation establishing the Chief of Police position as a separate public office. To the contrary, the Board has expanded the duties and title of the General Manager office to include police chief functions.

Third, like the police officer position in *Neigel*, the District's Chief of Police position is not "clothed with policy-making authority." Any policy-making authority exercised by the General Manager/Chief of Police is attributable to the duties the CSD Law imposes on the District's General Manager, not the additional police chief duties that Board has chosen to incorporate into the General Manager's position.

Board of Directors, Kensington Police Protection and Community Services District
December 8, 2015
Page 7

The Chief of Police position, like the community development director position examined by the Attorney General, is merely a managerial position that would report to and be supervised by the General Manager had the District had not combined those two positions. (See Gov. Code § 61051.) And, in our view, the fact that the General Manager/Chief of Police serves at the pleasure of the Board of Directors does not transform the Chief of Police position into a separate public office. Indeed, the CSD Law expressly requires the General Manager to serve at the Board's pleasure. (*Ibid.*)

Finally, the Attorney General's opinion in 68 Ops.Cal.Atty Gen. 7 (1984) does not alter our conclusion that the District's Chief of Police position is not a separate public office within the meaning of the incompatibility doctrine. In that opinion, the Attorney General concluded that the a deputy sheriff held a public office within the meaning of the doctrine based on state statutes creating the public office of county sheriff and based on the deputy sheriff's position as a peace officer. (1984 WL 162108 at p. *1.)

For two reasons, in our view, this Attorney General's opinion is inapposite. First, unlike the sheriff position before the Attorney General, there is no state or local law creating the community service district's chief of police position or prescribing the duties for that position. Second, relying on *Neigel*, the Attorney General concluded that peace officers are public officers within the meaning of the doctrine of incompatibility. (*Ibid.*) But as discussed above, the *Neigel* court reached the opposite conclusion, holding that the peace officer did *not* hold a public office for purposes of the doctrine. Indeed, 11 years later, the Attorney General reconsidered the same issue and concluded that a sheriff's deputy chief is not a public office within the meaning of the doctrine. (78 Cal.Atty.Gen 362 (1995).)

Because the District's General Manager/Chief of Police position constitutes only one public office, we conclude that the doctrine of incompatibility does not apply.

2. The General Manager and Chief of Police Positions are Not Incompatible.

Even if Chief of Police position were a separate public office within the meaning of the incompatible offices doctrine, we conclude that the General Manager and Chief of Police positions are not incompatible under the doctrine.

"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 officer exercises a supervisory, auditory, or removal power over the other." (Gov. Code § 1099 (a); 73 Ops.Cal.Atty.Gen. 183, 183-184 (1990); *People ex rel Chapman v. Rapsey* (1940) 16 Cal.2d 636, 641-642.)



Board of Directors, Kensington Police Protection and Community Services District
December 8, 2015
Page 8

Here, in our view there is no potential for a clash of duties or divided loyalties between the General Manager and Chief of Police. As noted above, the Chief of Police is a managerial position – a department head – who would report to, and be supervised by, the General Manager had the Board not combined those two positions. (Gov. Code § 61051.) With these roles combined, rather than supervising a Chief of Police, the General Manager is responsible for performing the police chief duties himself or herself. We see no public policy reason to conclude that the two roles are incompatible.

Moreover, in our view, neither position has supervisory, auditory or removal power over the other. As explained previously, the General Manager/Chief of Police reports directly to the Board of Directors. The fact that the CSD Law would give the General Manager supervisory and removal power over the Chief of Police had that position not been combined with the General Manager position does not mean that the General Manager/Chief of Police has supervisory or removal power over himself or herself. Rather, as explained above, the General Manager/Chief of Police serves at the pleasure of the Board.

C. Our Opinion Is Consistent with Prior Counsel’s View that the District May Lawfully Appoint One Person as its General Manager/Chief of Police.

Our conclusion is consistent with the District’s prior council’s opinion that there is no legal restriction on the District’s ability to appoint one individual to the dual role of General Manager/Chief of Police.

The District’s prior counsel cautioned that a court may reach a different conclusion. Counsel advised that a court may conclude that the General Manager’s supervisory authority for all District employees under the CSD Law makes the Chief of Police position incompatible should the court determine that the Chief of Police position is a separate public office. Counsel further cautioned that because it appears that the District is the only community service district to assign its General Manager the additional role as Chief of Police – and because state statutes that are *not* applicable to community service districts preclude general managers of cities and counties from simultaneously serving as a city police chief or county sheriff, the District may be more susceptible to legal challenge.

While of course not entirely free from doubt, for the reasons addressed above, in our opinion, it is highly unlikely that a court would conclude that the District may not assign its General Manager the additional Chief of Police title and duties, notwithstanding the unique staffing approach the District has taken.

Memorandum

ATTORNEY-CLIENT PRIVILEGED & CONFIDENTIAL

TO: Kensington Police Protection & Community Services District Board of Directors
FROM: Catherine J. Groves and David S. Gehrig
DATE: April 2, 2015
RE: **Compatibility of Roles: General Manager and Chief of Police**

I. ISSUE

Is it unlawful for the Kensington Police Protection & Community Services District ("KPPCSD" or "the District") to have one person simultaneously fill the role of General Manager and Chief of Police?¹

II. BRIEF ANSWER

No. There is no express prohibition against one individual fulfilling the duties of General Manager and Chief of Police for a community services district. The Community Services District Law (Cal. Gov't Code §§ 61000 *et seq.*, "the CSD Law" or "the Law"), does not prohibit one individual from holding the dual roles of General Manager and Chief of Police. Additionally, the doctrine of incompatible offices does not prohibit one individual from holding the dual roles of General Manager and Chief of Police for a community services district because the General Manager and Chief of Police are not two separate public offices, but rather a single public office (General Manager) with a second title and additional duties for the Chief of Police.

However, because there is no precedent directly on point, and because KPPCSD appears to be the only community services district with a dual role for its General Manager and Chief of Police, a legal argument could be made that the KPPCSD's arrangement does violate the doctrine of incompatible offices. While we don't believe such an argument would be legally correct, it is possible that a court could take a different view.

III. SUMMARY OF FACTS

We offer the following summary of facts based on only a cursory review of historic agency documents. The agency that is now the KPPCSD was initially formed as a police protection district in 1947. In 1954, the agency was reformed as a community services district, but still for the purpose of providing police protection services. The authority to provide park and recreation services was added in 1955. In 1994, and pursuant to Resolution 93-07, the name of the

¹ As special counsel to KPPCSD, we have not previously been asked to address this legal question.

ATTORNEY-CLIENT PRIVILEGED & CONFIDENTIAL

Memorandum To:

Kensington Police Protection & Community Services District Board of Directors

April 2, 2015

Page 2

agency was changed from Kensington Community Services District to Kensington Police Protection and Community Services District in order to indicate that the primary purpose of the District was to provide police protection services. It is our understanding that KPPCSD has had one individual serve as General Manager with the dual title of Chief of Police since the 1950s. Additionally, we understand that the District has a written job description for General Manager which includes both the duties of General Manager and Chief of Police in a combined list of duties.

Our investigation indicates that there are up to twelve community services districts in California that also provide police services. Of these, it appears that only KPPCSD employs a single individual as both the General Manager and Chief of Police. The results of our investigation are summarized below:

	COMMUNITY SERVICES DISTRICTS	NUMBER OF TITLES FOR GENERAL MANAGER AND CHIEF OF POLICE ROLE	NUMBER OF INDIVIDUALS PERFORMING BOTH ROLES
1.	Kensington Police Protection and CSD	Two (General Manager and Chief of Police)	One
2.	Broadmoor Police Protection District	One (Chief of Police); note that Broadmoor is not a community services district	One
3.	Stallion Springs CSD	Two (Chief of Police and General Manager)	Two
4.	Bear Valley CSD	Two (Chief of Police and General Manager)	Two
5.	Lake Shastina CSD	Two (Chief of Police and General Manager)	Two
6.	Capistrano Bay CSD	One (General Manager)	One (General Manager, who is not a police officer, has management responsibility over two Patrol Officers; there is no chief)
7.	Diablo CSD	One (General Manager)	One (police services are provided to District pursuant to an agreement with Contra Costa County Sheriff's

ATTORNEY-CLIENT PRIVILEGED & CONFIDENTIAL

Memorandum To:

Kensington Police Protection & Community Services District Board of Directors

April 2, 2015

Page 3

			Department)
8,	Mountain House CSD	One (General Manager)	One (police services are provided to the District pursuant to an agreement with San Joaquin County Sheriff's Department)
9.	Pauma Valley CSD	Two (Administrator and Security Captain)	Two
10.	Santa Lucia CSD	Two (General Manager and Director of Security)	Two
11.	Southern Coachella Valley CSD	Zero (four directors only)	Administration and law enforcement are contracted out
12.	Surfside Colony CSD	Zero (five directors only)	(not clear if police services are provided)
13.	Saddle Creek CSD	One (General Manager)	One (not clear if police services are provided)

Interestingly, KPPCSD is the only agency that describes itself as a "Police Protection and Community Services District." All of the other agencies listed above either call themselves a community services district, or in the case of Broadmoor a police protection district. Also, and perhaps of most relevance, of those agencies that have both a General Manager and a Chief of Police title, only KPPCSD has a single individual serving both roles. The closest arrangement from another agency is with the Capistrano Community Services District, which has the General Manager provide administrative services as well as management responsibility over two Patrol Officers.

IV. ANALYSIS

1. Community Services District Law

The CSD Law does not prohibit one individual from holding the dual roles of General Manager and Chief of Police. The CSD Law expressly requires the board of a community services district to appoint a General Manager. (Cal. Gov't Code § 61050.) Section 61051 of the Law establishes the roles and responsibilities of the General Manager. While section 61100(i) allows a community services district to provide police services to its constituents, it does not require a District to create a Chief of Police position. Additionally, there is no indication in the legislative history or any legal authority interpreting these provisions that one individual cannot hold the

roles of both the General Manager and Chief of Police for a community services District. Thus, neither the CSD Law nor the legal authority interpreting the CSD Law prohibits one individual from serving as both the General Manager and Chief of Police of a community services district.

Moreover, the Law expressly allows a District to have a single individual serve as both the General Manager and Treasurer. (Cal. Gov't Code § 61050.) This would appear to indicate a general legislative intent to grant community services districts, which are often thinly staffed and budget-constrained, additional flexibility to satisfy their staffing needs.

2. Incompatible Offices Doctrine

The doctrine of incompatible offices must also be considered in evaluating whether one individual may serve as both the General Manager and Chief of Police of a community services district. The common law doctrine, which has been codified in Cal. Gov't Code § 1099, applies when one individual holds two public offices resulting in a conflict between potentially overlapping public duties.

A. Basic prohibition

The seminal case, *People ex rel. Chapman v. Rapsey* (1940) 16 Cal.2d 636, outlines the common law doctrine of incompatible offices which has since been codified in Cal. Gov't Code § 1099². Section 1099(a) provides that "[a] public officer... shall not simultaneously hold two public offices that are incompatible." Section 1099 states that offices are incompatible when:

[A]ny of the following circumstances are present, unless simultaneous holding of the particular offices is compelled or expressly authorized by law:

- (1) Either of the offices may audit, overrule, remove members of, dismiss employees of, or exercise supervisory powers over the other office or body.
- (2) Based on the powers and jurisdiction of the offices, there is a possibility of a significant clash of duties or loyalties between the offices.
- (3) Public policy considerations make it improper for one person to hold both offices.

If the performance of the duties of either office could have an adverse effect on the other, the doctrine precludes acceptance of the second office. Once a second, incompatible public office is accepted, such acceptance constitutes an automatic resignation from the first office. (Cal. Gov't Code § 1099(b).) The doctrine of incompatible offices does not apply if one of the

² When codifying the common law doctrine, the legislature included the following legislative note: "SEC. 2. Nothing in this act is intended to expand or contract the common law rule prohibiting an individual from holding incompatible public offices. It is intended that courts interpreting this act shall be guided by judicial and administrative precedent concerning incompatible public offices developed under the common law." (Stats 2005 ch. 254.)

ATTORNEY-CLIENT PRIVILEGED & CONFIDENTIAL

Memorandum To:

Kensington Police Protection & Community Services District Board of Directors

April 2, 2015

Page 5

positions is merely employment and not a public office. (Cal. Gov't Code § 1099(c); See also 58 Ops.Cal.Atty.Gen. 109, 111 (1991).)

In applying this doctrine, courts typically first determine whether the positions are public offices and, second, whether the offices are incompatible. (See *Rapsey, supra*; 90 Ops.Cal.Atty.Gen. 24 (2007); 56 Ops.Cal.Atty.Gen. 556, 557 (1973); 40 Ops.Cal.Atty.Gen. 238, 239 (1962).)

B. Two Public Offices

Based on *Rapsey*, the Attorney General has set forth the following elements for determining whether an employment position is a "public office":

[A] public office is a position in government (1) which is created or authorized by the Constitution or some law; (2) the tenure of which is continuing and permanent, not occasional or temporary; (3) in which the incumbent performs a public function for the public benefit and exercises some of the sovereign powers of the state. (68 Ops.Cal.Atty.Gen. 337, 342 (1985).)

Here, the General Manager position is a public office because it was statutorily created by the CSD Law and has authority to implement board policies, appoint, supervise, discipline and dismiss employees, and supervise the District's facilities, services, and finances.

The Chief of Police position does not rise to the level of a public office because the CSD Law does not expressly require (or allude to) the creation of an office of the Chief of Police. Government Code section 61100(i) allows community services districts to "provide police protection and law enforcement services by establishing and operating a police department that employs peace officers pursuant to Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code." Chapter 4.5 of the Penal Code establishes the definition of the term "peace officer," but does not require the creation of a public office of the Chief of Police.³ Moreover, there does not appear to be any provision in the Penal Code nor any cases or California Attorney General opinions that expressly require the creation of an office of the Police Chief. While the enabling legislation of other local governmental entities, such as counties and cities, contain express provisions requiring the creation of a public office of Sheriff or Police

³ We note that courts have previously concluded that a police officer falls within the category of a public officer because the individual is entrusted with the duty and power to exercise a part of the sovereign governmental powers of the entity for which the individual is acting. (*Logan v. Shields* (1923) 190 Cal. 661, 664-665; *Noble v. City of Palo Alto* (1928) 89 Cal.App. 47, 52; *Brown v. Boyd* (1939) 33 Cal.App.2d 416, 422; *Estrada v. Indemnity Ins. Co.* (1958) 158 Cal.App.2d 129, 134-135; *People v. Woods* (1970) 7 Cal.App.3d 382, 387.) However, these cases do not analyze the doctrine of incompatible offices and their facts are distinguishable from those at hand. Additionally, other cases, such as *Nigel v. Superior Court* (1977) 72 Cal.App.3d 373, when applying the doctrine of incompatible offices, have concluded that peace officers are not public officers. In the words of the court, "the fact that policemen have been held to be public officers for certain purposes does not lead inevitably to the conclusion that they are "officers" for all purposes....The meaning of the words "officer" or "official" varies with the conditions and circumstances in which they are used." (*Nigel* at 378)

ATTORNEY-CLIENT PRIVILEGED & CONFIDENTIAL

Memorandum To:

Kensington Police Protection & Community Services District Board of Directors

April 2, 2015

Page 6

Chief, the enabling legislation for community services districts contains no such provision.⁴ (See Cal. Gov't Code §§ 24000 and 36501.)

In other instances, the California Attorney General has found that a public office may be created pursuant to a local agency's own legislative action, such as a city charter, city code or a resolution. (See 82 Ops.Cal.Atty.Gen. 201 (1999), 66 Ops.Cal.Atty.Gen. 176 (1983), and 76 Ops.Cal.Atty.Gen. 38 (1993). For instance, in 82 Ops.Cal.Atty.Gen. 201, the Attorney General concluded that it was a violation of the incompatible offices doctrine for the same individual to serve as both the City Administrator and Fire Chief, where the city charter established the position of Fire Chief and the city code established the position of City Administrator. This opinion can be distinguished from KPPCSD's General Manager/Chief of Police position in that there is no District ordinance or resolution establishing the position of Chief of Police.

Accordingly, we conclude that the Chief of Police position is not a separate public office under the common law doctrine of incompatible offices, but rather is merely a title and set of duties that are included within the duties of the General Manager public office. Necessarily, because only one of the titles is a public office, these two separate titles and combined role do not create incompatible offices. KPPCSD's current combined role of General Manager/Chief of Police does not violate any statutory laws or the common law doctrine of incompatible offices.

C. Conflict Between Offices

While the above analysis demonstrates that the doctrine of incompatible offices does not apply to the facts at hand because the role of Chief of Police is not statutorily created and, therefore, is not a public office for purposes of the doctrine, for the sake of argument we will nevertheless address whether the performance of both jobs by a single individual would give rise to a conflict.

As described above, Cal. Gov't Code § 1099 provides that offices are incompatible when one of the offices can assert authority over the other office, there is a significant clash of duties or loyalties between the offices, or public policy considerations make it improper for one person to hold both offices. Essentially, the incompatible offices doctrine seeks to prevent one individual from having divided loyalties. (68 Ops.Cal.Atty.Gen. 337, 339 (1985).) The Attorney General does note, however, that occasional conflicts of interest which are "inevitable" when performing dual responsibilities do not necessarily cause offices to be incompatible. (74 Ops.Cal.Atty.Gen. 82, 85 [noting that the position of fire division chief and city council member are not incompatible even though there is some overlap, including issues of budgetary priorities, and employment decisions against the chief's superiors].)

⁴ Note that the California Attorney General concluded that one individual could not serve as both a county supervisor and deputy sheriff in the same county. (68 Ops.Cal.Atty.Gen. 7, 8 (1984).) However, the opinion relied on a number of statutory provisions that created the office of a county sheriff, set forth the sheriff's duties, and the board of supervisors' control over the sheriff, which provisions do not exist in the CSD Law. Moreover, the county supervisor is an elected position, which creates a very different legal relationship with employees of the agency than KPPCSD's General Manager has with the Chief of Police position.

ATTORNEY-CLIENT PRIVILEGED & CONFIDENTIAL

Memorandum To:

Kensington Police Protection & Community Services District Board of Directors

April 2, 2015

Page 7

Here, we do not perceive an actual clash of duties or loyalties because the roles of the General Manager and Chief of Police are distinct, and just two titles which both report directly to the KPPCSD Board of Directors. On the other hand, under the CSD Law, the General Manager is responsible for "the appointment, supervision, discipline, and dismissal of [all of] the district's employees." (Government Code section 61051(b).) This alone could cause a court to find that there is a conflict between the two positions, since Government Code section 1099 defines a conflict between public offices as existing when "either of the offices may audit, overrule, remove members of, dismiss employees of, or exercise supervisory powers over the other office or body."

V. CONCLUSION

The CSD Law does not prohibit one individual from holding the dual roles of General Manager and Chief of Police for the District. Moreover, the doctrine of incompatible offices also does not prohibit one individual from serving the dual roles of General Manager and Chief of Police, primarily because only the General Manager position is a public office. The Chief of Police position is not a public office, but only a title and set of duties that are incorporated into the General Manager position. While there is no case law or Attorney General opinion directly on point to confirm this conclusion, we nonetheless conclude that it is lawful for the KPPCSD to have a single individual serve as both the General Manager and Chief of Police.

However, our conclusion comes with several caveats and cautions. First, the law regarding incompatible offices is sufficiently vague to allow for an argument (unpersuasive in our view) that the two positions are both public offices that are incompatible with each other. If a court were to determine that the General Manager and Chief of Police positions were both public offices, it is not only possible but likely that the court would find the two offices to be incompatible based on the fact that the General Manager has supervisory authority over all other employees of the District. Second, it appears that KPPCSD's current arrangement is unique among community services districts as we were not able to find another community services district that has a single individual serving as both a General Manager and the Chief of Police. This makes KPPCSD more visible and possibly more susceptible to challenge. Finally, it is well established that a Chief of Police for a city and the Sheriff for a county are both considered public offices, based on statutes particular to those types of agencies. While the legal analysis is different for cities and counties, the fact nonetheless makes KPPCSD's arrangement unique.

Based on the foregoing, and in light of public sentiment within Kensington, the District may desire to revisit its policy decision to have one individual fulfill both the role of General Manager and Chief of Police, even though a change is not legally required.