

Facts:

Commissioner Kennedy was appointed to the PUC in January 2003. Her term of office runs through January 2009. In June of 2003 she was appointed to the California Bay Delta Authority ("CBDA") as a Public Member representing the interests of the San Francisco Bay Region. That term of office expires in January 2006.

Commissioner Kennedy's bio on the PUC website indicates that she was instrumental in the formation of the CBDA while she was on Governor Davis' staff:

"Among the significant policy initiatives Ms. Kennedy managed for the Governor [was] [t]he historic CalFed Record of Decision on restoration of the San Francisco Bay Delta."

California Law:

California case law prohibits any person from holding two or more incompatible offices simultaneously. The law provides that a person holding incompatible offices is deemed to have vacated the first office at the moment she accepts the second office. People ex rel Chapman v. Rapsey, 16 Cal. 2d 636, 644 (1940) (Holding that the offices of City Judge of the City of San Bruno and City Attorney of San Bruno are incompatible).

The two offices in question being incompatible, it follows that when the respondent accepted the office of city attorney, said acceptance had the effect of vacating or terminating his right to hold the office of city judge. As was said in People v. Garrett, supra: "The rule is settled with unanimity that where an individual is an incumbent of a public office and, during such incumbency, is appointed or elected to another public office and enters upon the duties of the latter, the first office becomes at once vacant if the two are incompatible (Mechem on Public Officers, sec. 419; 22 R. C. L., sec. 63) ..."

McQuillin on Municipal Corporations, second edition, volume 2, section 469, thus states the rule: "The common law rule is that the acceptance by a public officer of another office which is incompatible with the first thereby vacates the first office; that is, the mere acceptance of the second incompatible office per se terminates the first office as effectively as a resignation."

16 Cal. 2d at 644.

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assumption of the second office terminated the second office as effectively as a resignation.

People ex rel Bagshaw v. Thompson, 55 Cal. App. 2d 147, 154 (1942).

Incompatibility is a broad standard. The Plaintiff must show that the potential exists for a conflict of interest, but need not prove that an active conflict exists. It is no defense that the officeholder recuses herself, or promises to recuse herself, from decisions wherein a conflict may occur. Two offices are said to be incompatible “when the holder cannot in every instance discharge the duties of each.” 16 Cal. 2d at 641 (quoting McQuillin on Municipal Corporations, Vol. 2, Sec 469).

Two offices are incompatible where “the nature and duties of the two offices are such as to render it improper, from consideration of public policy, for one incumbent to retain both.” 16 Cal. 2d at 641 (quoting Dillon on Municipal Corporations, 5th ed., sec. 419). Further, “[t]he common law doctrine of incompatible offices prohibits a person from holding two public offices at the same time if the performance of the duties of either office could have a significant adverse effect on the other.” 03 C.D.O.S. 11062 (Attorney General Op. No. 03-901, Dec. 19, 2003) (Hot Springs Valley Irrigation Dist. Member and Modoc County Supervisor are incompatible offices).

Commissioner Kennedy’s votes as a PUC Commissioner are null and void if cast after she took the incompatible office.

By statute, the state can exclude certain offices from the incompatibility doctrine. Neither of Commissioner Kennedy’s offices has been granted such an exclusion. The very law that created the CBDA lists several offices that are therein granted express exclusions from the incompatibility prohibition. For instance, the Secretary of the California Environmental Protection agency is named as a Member of the CBDA. No exclusion is made for PUC Commissioners. Cal. Water Code § 79412.

The conflicts between the two offices arise due to the conflicting goals of the two organizations. What the PUC considers to be in the best interests of the public with respect to its land use decisions may differ from that of the CBDA in its determination of what may be in the best interests of the wildlife or farmers in the Bay Delta. Ms. Kennedy may be asked to vote on whether to allow private water companies to acquire or sell water that potentially compete with or relieve competition for water that could be used to meet the goals of the CBDA.

Public Interest Impact:

The potential exists for PUC decisions to shift the costs of environmental, water and fishery programs that further the CBDA’s goals and programs onto the backs of ratepayers and away from overstretched state or federal funds, bonds or grants.

In fact, Kennedy has already, or soon will, cast votes as a PUC Commissioner that appear to have benefited the goals of the CBDA. For example, Kennedy voted to approve the terms of a Bankruptcy Court order confirming a reorganization plan that incorporates the provisions of the settlement agreement between the PUC and PG&E.

Kennedy's vote was improper due to an active conflict of interest. The PUC's settlement agreement with PG&E included a transfer of 140,000 acres of watershed from PG&E to a nonprofit corporation created by PG&E. Members of the Board of Directors on this nonprofit include constituent agencies reporting to the CBDA.

This sweetheart deal allows the CBDA to accomplish several of its statutory goals. The nonprofit could improve water quality in the Bay Delta through management of the watershed, or it could trade or sell a portion of the watershed in order to obtain other land critical for CBDA programs.

In sum, the PUC's authorization of the settlement gave the CBDA greater control over the valuable watershed than it would have had otherwise, and it did so potentially against the interests of the ratepayer.

Also, Kennedy is scheduled to vote on the question whether the Southern California Water Company ("SCWC") acted prudently in leasing to the City of Folsom its water rights in the American River. The issues before the PUC on this vote include whether the deal was in the ratepayers' interest; whether SCWC's sales should be retroactively ratified; whether any penalty should be imposed; and whether SCWC's ratepayers should pay for the company's future purchases of water rights to make up for the lost water rights.

The interests of SCWC and the ratepayers potentially conflict with those of the CBDA in that increased reliance by SCWC on American River water may reduce water flows into the Delta, contrary to the stated goals of the CBDA.