

Proposed Amendment to Board Policies and Procedures, No. 3

The following addition to the board's Policies and Procedures has been proposed:

Upon the request of any board member, the Executive Director/Chief Executive Officer shall, on behalf of the Authority, obtain an opinion of the Attorney General of the State of California as to whether a board member or Peer Review Group member is holding another public office incompatible with Authority board membership or membership on the Peer Review Group.

It is suggested that this language could be added to Article VI, with a change to the Article VI heading, or added as part of a new article.

Analysis

This proposed amendment would create a mechanism by which an official request would be made to the Attorney General for an opinion as to whether a member of the Authority board or a member of the Peer Review Group who holds another public office is holding incompatible offices. The request would be made by a board member who could be but need not be the member holding the other office.

The Law Concerning Incompatible Offices

The common law, recently codified as Government Code section 1099, prohibits a person from holding incompatible offices. The law describes three situations in which two offices are deemed incompatible:

1. When one 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."

In the case of the second situation described above, it is not necessary that an actual conflict exist in order for two offices to be incompatible. It is the possibility that a conflict could arise that matters. "Prospective as well as present clashes of duties and loyalties give rise to the prohibition. Only one significant clash is required to make offices incompatible." (82 Ops. Cal. Atty. Gen. 201.) Moreover, "[t]he ability to abstain when a conflict is presented will not excuse the incompatibility or obviate the effects of the prohibition."

The legal consequence of assuming an incompatible office is described as follow:
“When two public offices are incompatible, a public officer shall be deemed to have forfeited the first office upon acceding to the second.” (Gov. C. sec. 1099, subd. (b).)

The Attorney General’s Role in Rendering Opinions

Government Code section 12159 provides, in pertinent part, as follows:

The Attorney General shall give his or her opinion in writing to . . . any state agency . . . [and other described types of officials] when requested, upon any question of law relating to their respective offices.

The Attorney General also has a role in connection with legal proceedings initiated for the purpose of determining whether an officeholder has forfeited his or her earlier office as a result of assuming a second office that is incompatible with the first office. (See Code of Civil Procedure section 803.)

Effect of Proposed Amendment

The proposed amendment appears intended to invoke the Attorney General’s obligations under the above-cited Government Code section 12159. The Executive Director would be obliged to request an opinion from the Attorney General if a board member believes that either he or she or another board member is holding an office incompatible with Authority board membership, or that a member of the Peer Review Group is holding an office incompatible with service on the Peer Review Group. The Executive Director’s request would be deemed to be a request being made on behalf of, and therefore by, the Authority.