BEST BEST & KRIEGER LLP
ATTORNEYS AT LAW

Memorandum

To: Members of the Board of Directors,
Municipal Water District of Orange County
From: Best Best & Krieger LLP
Date: September 25, 2017
Re: Conflicts of Interest and Ethical Issues with Outside Employment of Board Members

QUESTION PRESENTED

Can a member of the Board of Directors ("Director") for the Municipal Water District of Orange County ("MWDOC"), who is also appointed to the Metropolitan Water District of Southern California's ("Metropolitan") Board of Directors by MWDOC, become an assistant general manager ("AGM") at the Yorba Linda Water District, a MWDOC Member Agency, under relevant ethics and conflicts of interest law?

CONCLUSION

Yes, the Director may act as AGM for the Yorba Linda Water District without violating ethics or conflicts of interest laws. The position of AGM is not a "public office" under the incompatibility of office doctrine, and neither MWDOC, Metropolitan, nor the Yorba Linda Water District have adopted specific rules or policies prohibiting such dual roles. If at some point the AGM becomes the general manager, the Director would be holding incompatible offices and would be deemed to have forfeited his position as Director to MWDOC and Metropolitan.

While holding both positions is allowable, the Director must be cognizant of his fiduciary obligations to MWDOC and Metropolitan as a member of their Boards of Directors. For example, he may learn certain information as AGM pertaining to MWDOC or Metropolitan, and may have a fiduciary duty to MWDOC and/or Metropolitan to disclose such information. As such, the Director should take care to avoid situations in which his work will conflict or otherwise affect MWDOC or Metropolitan, and should seek to establish parameters at the Yorba Linda Water District to handle such issues. Additionally, the Director must be wary of situations in which his role as a Director at MWDOC or Metropolitan will involve a contract with Yorba Linda Water District that will closely relate to his duties / department at the Yorba Linda Water District. In such instances, the Director must recuse himself from consideration of the contract at MWDOC or Metropolitan as appropriate.

ANALYSIS

1. Incompatibility of Office

The Director may become AGM at Yorba Linda Water District without violating the incompatibility of office doctrine because the position of AGM is not a "public office." If the AGM at some point officially becomes the general manager, however, the incompatibility of office doctrine will apply. There is no definitive precedent determining whether temporarily filling this role as an interim general manager, or while the general manager is on sabbatical, will result in holding incompatible offices, but it likely will depend on the permanence of the position.

Incompatibility of office is a common law doctrine that prevents simultaneously holding two public offices which are incompatible. The doctrine has been codified in Government Code section 1099, which provides as follow:

> (a) A public officer, including, but not limited to, an appointed or elected member of a governmental board, commission, committee, or other body, shall not simultaneously hold two public offices that are incompatible. Offices are incompatible when any of the following circumstances are present, unless simultaneous holding of the particular offices is compelled or expressly authorized by law:
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> > (1) Either of the offices may audit, overrule, remove members of, dismiss employees of, or exercise supervisory powers over the other office or body.
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> > (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.

It is therefore a two-step analysis: first, whether both of the two positions constitute a "public office," and if so, whether such public offices are incompatible. Section 1099 provides guidance on when the offices are deemed incompatible, but common law and the California Attorney General provide guidance on those positions constituting "public office." For the purpose of the doctrine of incompatible public offices, 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. The Court of Appeals further clarified the meaning of "sovereign powers of the state" for the purposes of identifying a "public office" in *Schaefer v. Superior Court*

(1952) 113 Cal.App.2d 428, 432-433: "If specific statutory and independent duties are imposed upon an appointee in relation to the exercise of the police powers of the 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."

Based on this language, it is possible that non-elected officials who exercise the sovereignty of the state may be considered holding a "public office" for the purposes of incompatibility of office analysis. For example, the California Attorney General has concluded that a city manager and a hospital district general manager occupy a "public office" (80 Ops.Cal.Atty.Gen. 74, 68 Ops.Cal.Atty.Gen. 337, 344-346). However, the California Attorney General has also specifically found that an assistant city manager, which is a similar position to that of an assistant general manager, is *not* a "public office" (80 Ops.Cal.Atty.Gen. 74):

> "With respect to the position of the assistant city manager in question, neither the position itself nor the duties of the position are established by law, nor is the position anywhere referred to in the statutes pertaining to the city manager or in the city's municipal code. We are advised that the assistant city manager is appointed by the city manager and acts as an employee having responsibilities only as directed by the city manager. The fact that the assistant city manager may from time to time perform some of the duties of the city manager does not transform the assistant city manager into the city manager (cf. *People v. Kwolek* (1995) 40 Cal.App.4th 1521, 1530-1531; 79 Ops.Cal.Atty.Gen. 159, 161-162 (1996)), or the position of assistant city manager into a public office (see 78 Ops.Cal.Atty.Gen. 362, supra, [sheriff's deputy chief]; 56 Ops.Cal.Atty.Gen. 556 (1973) [assistant superintendent of public instruction])."

Like the assistant positions described in the Attorney General opinion, the position of AGM is not established by law and not referred to anywhere in the Yorba Linda Water District Policies and Procedures Manual, as adopted by the Board of Directors on July 28, 2016, Resolution No. 16-12 ("YLWD Manual"). The AGM is a budgeted staff position which, like any other non-appointed position, can be eliminated, for example, in lean budget years, and can be eliminated without amending its governing code. The Human Resources' job description states the AGM, "works under the direction of the General Manager." While the duties of the General Manager and AGM necessarily overlap given their high level executive character, the AGM fundamentally acts as an assistant to, is directed by, and reports to the General Manager. The AGM does not report to the Board but rather, "is accountable for accomplishing the goals and objectives

established by" the General Manager. (Yorba Linda Water District, Class Specification Bulletin, Assistant General Manager, June 7, 2017.) These facts, along with the above authorities, support the conclusion that, as AGM, the Director ordinarily will not be occupying a public office, and thus will not be holding an incompatible office.

That being said, if the AGM becomes the general manager in the event of an extended leave of absence, death or incapacitation of the general manager, or the general manager's departure, the Director will be occupying incompatible offices. Under Government Code section 1099(b), the Director "…shall be deemed to have forfeited the first office upon acceding to the second," meaning that the Director will have forfeited his position as Director at MWDOC and Metropolitan.

There is no direct authority determining what would happen in the event that the general manager is temporarily absent, leaving the AGM to fill the duties of the general manager. The California Attorney General has determined in at least one case, and in the context of a deputy sheriff, that fulfilling such a role does not make the deputy a public official for purposes of the incompatibility of office doctrine (78 Ops.Cal.Atty.Gen. 362, 366-368):

> The position of sheriff's deputy chief is not described by statute or ordinance as constituting a public office. Subdivision (b) of section 24000 lists the sheriff as being a county "officer"; no other position in the sheriff's department is so listed. Those serving below the sheriff are described in section 24105 as having "positions" rather than "offices": "If the office of any of the county officers enumerated in Section 24000 of this code is vacant, the duties of such office may be temporarily discharged by a chief deputy, assistant or deputy of such officer, as the case may be, next in authority to such county officer in office at the time the vacancy occurs, with like authority and subject to the same obligations and penalties as such county officer, until the vacancy in the office is filled in the manner provided by law; provided that if the vacancy occurs in the office of sheriff, the duties of such office shall be discharged by the undersheriff, or if that position is vacant, by the assistant sheriff, or if that position is also vacant, by the chief deputy next in line of authority."
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> The duties and powers of a sheriff's deputy chief are not specified by statute, charter, or ordinance. A deputy chief, while performing sovereign duties as in *Neigel*, does not hold a policy-making position. Rather, he has an administrative position which could be eliminated by internal reorganization. Thus the position does not appear to meet the criterion of "an office which is not transient,

occasional or incidental but is in itself an entity in which incumbents succeed one another."

This opinion indicates that as long as the AGM is only filling a vacancy temporarily until the general manager returns or a new general manager is employed through appropriate channels, the AGM would not be holding incompatible offices. However, there is some uncertainty and a lack of definitive precedent on this issue. As a result, if there were a concern about this situation, MWDOC and/or Metropolitan could consider enacting policies, pursuant to Government Code Section 1126 (as discussed in the next section), that specify the situations in which such temporary employment may be considered an incompatible activity.

2. **Government Code Section 1126**

The Director will not be violating Government Code section 1126 by acting as both AGM of Yorba Linda Water District and a Director at MWDOC and at Metropolitan, because neither MWDOC, Metropolitan, nor the Yorba Linda Water District have adopted a specific rule or policy that would govern such activities. While these agencies may have adopted rules or policies governing other activities of their respective employees or officers, none of these rules or policies relate specifically to the issue addressed in this memorandum.[1]

Government Code section 1126 prohibits public employees and officials from engaging in activities which are "inconsistent, incompatible, in conflict with, or inimical to his or her duties, functions, or responsibilities of his or her appointing power or the agency by which he or she is employed." However, section 1126 is not self-executing, and requires the agency to "adopt rules governing the application of this section," which includes notice to employees of the determination of prohibited activities, of disciplinary action, and appeals procedures.

The Yorba Linda Water District Personnel Rules govern the application of section 1126 to 'incompatible activities' of its employees, including the AGM. Specifically, Section 6.12 restricts the Director's activities at outside agencies (i.e., MWDOC and Metropolitan). Among others activities, Section 6.12 prohibits Yorba Linda Water District employees from conducting outside activity on District time, and requires its employees who undertake outside employment to notify their immediate supervisor in writing of the nature, duties, and hours of that employment. Such activities and required notification will be managed by the Yorba Linda Water District and do not prohibit the Director from accepting the AGM position while concurrently serving on the Boards at MWDOC and Metropolitan.

[1] While Government Code Section 1126 applies primarily to subordinate employees and officers of a local agency, the Attorney General has extended Government Code Section 1126 to governing bodies and elected officials on numerous occasions. (*See, e.g.*, 63 Ops.Cal.Atty.Gen. 916 [applying Government Code Section 1126 to a county supervisor]; 58 Ops.Cal.Atty.Gen. 109 [concurrent member of school board and city personnel board].)

Neither MWDOC, Metropolitan nor the Yorba Linda Water District have adopted rules or policies that would prohibit the Director's role as AGM at the Yorba Linda Water District. Government Code Section 1126 provides wide latitude in determining such incompatible activities. Section 1126 is limited to any activity, employment, or enterprise for compensation, that is in some way inconsistent, incompatible, or in conflict with, or inimical to duties as a local agency officer or employee.[2] As such, MWDOC could implement rules prohibiting any MWDOC employees or official from employment elsewhere that could be in conflict or inconsistent with his or her duties to MWDOC.

In terms of what the rules or changes to the Administrative Code would look like, MWDOC would need to specify incompatible, inconsistent, conflicting, or inimical activities or enterprises, as well as provisions for notice of the determination of prohibited activities, of the consequences of engaging in such prohibited activities, and for appealing such determinations. These requirements would not only ensure MWDOC achieves its policy goals, but also ensure that due process requirements under the California and United States Constitutions are protected.

In light of such requirements for notice of prohibited activities and appeals procedures, if MWDOC were to adopt and implement rules governing incompatible activities, past positions would likely be deemed grandfathered. In other words, while such policies may prohibit incompatible or conflicting activities moving forward, it may not penalize officers or employees from actions taken prior to implementation or adoption of such rules.

3. **Government Code Section 1090**

Though the Director's role as AGM of the Yorba Linda Water District, in and of itself, does not violate Government Code section 1090, the Director must be cognizant of certain circumstances that might require his recusal from matters being considered by MWDOC or Metropolitan.

Under Government Code Section 1090, a member of a governing body shall not be financially interested in any contract made by him/her in their capacity as a Director. Typically, if a Director has a financial interest in a contract that is not a specifically permitted "remote interest" or "non interest" described below, the entire Board of Directors is disqualified and the agency is prohibited from entering into the contract. This is the reason why, for example, a member of the Board of Directors may not seek employment within MWDOC; the entire Board of Directors would be disqualified from considering (and approving) that director's employment contract.

In the current situation, there is a potential that the Director could be considering a contract between MWDOC or Metropolitan and the Yorba Linda Water District while working on that contract as an employee of the Yorba Linda Water District. Government Code Section 1091.5(a)(9), however, contains an exception whereby the interest of a board member who

[2] See above footnote.

receives a salary from another government agency contracting party is considered a "non-interest," so long as the contract that is involved does not pertain directly to the department in which the Director works as AGM. If it does, the interest is determined to be a "remote interest" under Government Code section 1091(b)(13), which would require the Director to recuse himself from deliberation by the MWDOC or Metropolitan Board, as the case may be. However, the Director may work as AGM on implementation of the contract.[3]

It is unclear what sorts of contracts would "directly involve" the department at which the AGM is employed, given that the AGM will preside under the general manager over the entire Yorba Linda Water District. It is possible, given the breadth of the AGM position, that any contract between MWDOC and/or Metropolitan and Yorba Linda Water District will be considered a part of the AGM's department. The Director must therefore use his discretion to determine when recusal is appropriate, and should always disclose such interest to the entire Board of Directors. A prudent approach may be to recuse himself from any contract between Yorba Linda Water District and either MWDOC or Metropolitan given the consequences of violating Government Code section 1090.[4]

4. **Fiduciary Obligations**

As a Board member of MWDOC and Metropolitan, the Director has a fiduciary responsibility to MWDOC and Metropolitan, respectively. As a result, if in his role as AGM he learns something of direct significance to MWDOC or Metropolitan, he would likely have an obligation to share or act on the information as a MWDOC or Metropolitan Board member, as the case may be. As a result, the Director will have to be careful to try and avoid such situations.

In addition, Section 7107 of the Metropolitan Administrative Code prohibits release of any confidential information obtained while a member of the Metropolitan Board of Directors to unauthorized persons without consent of the Metropolitan Board of Directors. This provision restates existing fiduciary obligations of confidentiality held by board members generally. The Director will need to be cognizant of this to the extent he obtains confidential information as a Metropolitan Director (or MWDOC Director, for that matter) that may have some connection to work he is doing as AGM.

Considering these fiduciary obligations and confidentiality requirements, the Director would benefit from establishing parameters with the Yorba Linda Water District to avoid situations in which these obligations may arise. Such parameters may include establishing some

[3] The Metropolitan Administrative Code mirrors these prohibitions generally in Section 7105.
[4] Willful violation of Section 1090 may result in a lifetime ban from public office, in addition to annulment of the contract at issue if criminally prosecuted. *Thomson v. Call* (1985) 38 Cal.3d 633, 645-649; Government Code section 1097(a).

sort of ethical wall, a well-defined scope of work, or automatic recusal from consideration on either end of such issues.

5. **General Conflicts / Financial Interest**

As a government employee receiving only income as an employee, or a per diem as a Board member, there are exceptions to the conflict prohibitions. Under Government Code Section 87103 in the Political Reform Act ("PRA"; Gov. Code. Sec. 8100 *et seq.*), a public official has a financial interest if it is reasonably foreseeable that the decision will have a material financial effect on the official, a member of her immediate family, or on any of the following: … (c) Any source of income aggregating $500 or more in value provided or promised to, received by, the public official within 12 months prior to the time when the decision is made. Government Code Section 82030(b)(2) however provides that "income" does not include salary and reimbursement for expenses or per diem received from a government agency. Nevertheless, although a government salary is not considered to be a financial interest under the PRA, financial interests also include investments, business positions, gifts and sources of travel payments. Under the PRA, public officials with a financial interest in a matter are required to publicly disclose this interest, leave the meeting room, and recuse themselves from all participation in the matter. (Gov. Code § 87105)

Additionally, the Metropolitan Administrative Code contains prohibitions on certain interested transactions for the Director when acting as a Metropolitan Director, and expands the conflict of interest rules to include the financial interests of adult children, stepchildren, parents-in-law, stepparents, siblings, grandparents and grandchildren. Such prohibitions include offering inducements to any party in hopes of obtaining reciprocal favors, making or participating in making or attempting to influence a transaction, contract, grant or sale to which Metropolitan is a party and the Director has a financial interest (as defined in the Political Reform Act, including the exception described above for salary or per diem), or granting any special consideration, treatment or advantage to any particular person over other similarly situated persons. As such, to the extent a contract or transaction with the Yorba Linda Water District is being considered with Metropolitan, in addition to recusal under Government Code Section 1090, the Director must be cognizant and act in accordance with these principles.

CONCLUSION

In summary, the Director may serve as AGM at the Yorba Linda Water District. If the AGM were at some point in the future to become the general manager on a permanent basis, the incompatibility doctrine would apply and the Director will be deemed to have forfeited his position as Director to MWDOC and Metropolitan. As AGM, the Director must be cognizant of his fiduciary duties to MWDOC and Metropolitan, and take care to consider recusal in the event any contract pertaining directly to the Yorba Linda Water District is being considered by MWDOC or Metropolitan. Lastly, if MWDOC desires, it may, on a going forward basis, adopt and

implement policies, rules and regulations, or amendments to its Administrative Code to more specifically define activities and offices that MWDOC deems inconsistent with serving as an employee or official at MWDOC.