California Fair Political Practices Commission

September 23, 1986

Clayton P. Roche
Deputy Attorney General
DEPARTMENT OF JUSTICE
350 McAllister Street, Room 6000
San Francisco, CA 94102

Re: Opinion No. 86-401
Our File No. I-86-181

Dear Mr. Roche:

This is to confirm our telephone conversation of September 17, 1986. You have completed the draft of your Opinion Number 86-401 for Assemblyman Byron D. Sher. Mr. Sher has requested advice on a question involving Government Code Section 1090. Your only reference to the Political Reform Act is a footnote pointing out that, in certain circumstances, the result under Section 1090 may differ from the result under the Political Reform Act. Such an admonition is appropriate and is similar to the kind of admonition regarding Section 1090 which we place in our advice letters.

This agency has no other comments to submit on this matter at this time. On the subject generally, you may find the enclosed advice letters to Lance Olson (No. A-85-242) to be of interest.

Thank you for giving us the opportunity to comment on this matter. If you have any further questions, I may be reached at ATSS 8-492-5901.

Sincerely,

Diane M. Griffiths
General Counsel

Robert E. Leidigh

By: Robert E. Leidigh
Counsel, Legal Division

DMG:REL:km
Enclosures

JOHN K. VAN DE KAMP
Attorney General

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May 22, 1986

Barbara Milman, Esq.
General Counsel
Fair Political Practices Commission
P. O. Box 807
Sacramento, CA 95804

Dear Ms. Milman:

Re: Opinion No. 86-401

Enclosed is an opinion request we have received from Assemblyman Byron D. Sher. The request consists of an original request dated February 13, 1986 and a supplemental request dated February 27, 1986. Also enclosed is our partial informal response to the initial request, dated February 27, 1986.

We delayed requesting the views of interested parties until we issued Opinion No. 85-1105, which also involves the changes from the Education Code conflict of interest provisions to section 1090 of the Government Code. A copy of that opinion, issued May 14, 1986 is also enclosed.

You are invited to submit whatever views you may have on the questions presented.

Very truly yours,

JOHN K. VAN DE KAMP
Attorney General

Clayton P. Roche

CLAYTON P. ROCHE
Deputy Attorney General

CPR:mrf
Enclosures

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BYRON D. SHER
ASSEMBLYMAN, TWENTY-FIRST DISTRICT

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JOINT COMMITTEE ON THE ARTS
JOINT COMMITTEE ON PRISON CONSTRUCTION & OPERATIONS

3/2

February 27, 1986

John Van de Kamp
Attorney General
1515 K Street, Suite 511
Sacramento, Ca 95814

Dear John:

I wrote you a letter dated February 21, 1986, requesting a written opinion relating to a conflict of interest question under the Government Code. School board members were recently brought under the Government Code conflict of interest provisions by virtue of my AB 1849, Ch. 816, 1985 Statutes.

Just after my letter was mailed, I received the enclosed letter raising additional questions about the Government Code conflict of interest provisions as they relate to a school board member whose spouse is employed by the school district. The questions are succinctly stated on page 2 of the enclosed letter.

I would like to broaden my initial request and ask you to give me a written opinion on the questions raised in the enclosed letter, as well as the question asked in my letter of February 21. I look forward to receiving your opinion and want to thank you in advance for your cooperation in this matter.

Sincerely,

Byron

BYRON D. SHER, Assemblyman
21st District

BDS:jm
Enclosure

3/2

RECEIVED
MAR 3 1986
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SAN FRANCISCO

REPLY TO: _____

February 20, 1986

RECEIVED
FEB 21 1986

Assemblyman Byron Sher
785 Castro Street, Suite C
Mountain View, CA 94041

Re: School Board Member Conflict of Interest; AB 1849

Dear Assemblyman Sher:

In speaking with your office, our firm has been advised that you are considering requesting an opinion from the Attorney General concerning Government Code section 1090, et seq. and the conflict of interest provisions as applicable to school board members.

Our law firm represents school boards throughout the state and issues concerning the new law have arisen with board members in several of our client school districts. Particular issues concerning Government Code section 1091.5 and the permissible spousal relationships have come up repeatedly. Because of the recurrence of particular questions and their importance for schools board members throughout the state, we feel a definitive opinion from the Attorney General is important.

We are aware that the Yolo County Counsel's office has submitted a request for an opinion on section 1090 (Op. No. 85-1105, assigned in November 1985). That request concerns the board member's interest in the collectively bargained agreement with the bargaining unit of the employee/spouse and the board member's participation in negotiations for the agreement. Additional issues have arisen, however, that are not presented in the Yolo County Counsel's request. These issues involve the board member's interest in the individual employment contract of the employee/spouse.

Because these particular issues are causing concern for several board members throughout the state, we would ask that you include the following in any opinion request submitted by your office:

Does a prohibited interest in a contract exist in the following circumstances:

1. A spouse has been employed by a school district for several years prior to the board member's election or appointment. After the member's election or appointment the spouse seeks a promotion or another employment position with the district.

2. A spouse has been employed as a substitute teacher by a school district for several years. After the board member's election or appointment the spouse wishes to continue annual employment as a substitute teacher in the district or the spouse applies for a permanent employment position in certificated or classified service for the district.

If you have any questions or would like to discuss the matter further, please do not hesitate to contact me.

Very truly yours,

BREON, GALGANI, GODINO & O'DONNELL

Kerry Cunningham

Kerry Cunningham

KC:jr

JOHN K. VAN DE KAMP
Attorney General

State of California
DEPARTMENT OF JUSTICE

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February 27, 1986

Honorable Byron D. Sher
Member, California State Assembly
State Capitol, Room 2136
Sacramento, California 95814

Dear Assemblyman Sher:

This is in reply to your February 13 request for an opinion interpreting Government Code section 1090. You indicate that as a result of your AB 1849 enacted as Chapter 816, Statutes of 1985, Education Code section 35233 now provides that article 4 (commencing with section 1090) and article 4.7 (commencing with section 1125) of Division 4, Title 1 of the Government Code are now applicable to members of the governing boards of school districts.

Your February 13 letter stated that a school board president recently resigned in order that his wife could be hired by the school district upon advice from the county counsel that she could not be hired while he was a member of the board. You indicated your understanding while AB 1849 was under legislative consideration that under the Government Code a local elected official with a conflict of interest on a matter before the body was simply required to refrain from participating in the matter in any way and to refrain from voting, and that there was no requirement that he or she resign from the body. You ask that we provide you with an opinion as soon as possible whether this is true.

In our view it is not true that Government Code section 1090 is satisfied by abstention from any board action on the contract in which a board member has a financial interest. Section 1090 renders any contract made by a board when a member of the board has a financial interest in the contract void.

Government Code section 1090 provides that the officers named "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". Thus the section literally proscribes contracts by a board when any member of the board has a financial interest in the contract, whether or not the interested member abstains.

Under Civil Code section 5110, with few exceptions, each spouse has a half (community property) interest in the earnings of the other spouse acquired during the marriage. (Martin v. Southern Pacific Co. (1900) 130 Cal. 285.) Thus a school board member would normally have a financial interest in his or her spouse's earnings under an employment contract.

Statutes prohibiting conflict of interest by a public officer are strictly enforced. (Terry v. Bender (1956) 143 Cal.App.2d 198.) The purpose of Government Code section 1090 is not only to strike at actual impropriety, but also to strike at the appearance of impropriety. (City of Imperial Beach v. Bailey (1980) 103 Cal.App.3d 191.) In 14 Ops.Cal.Atty.Gen. 78 (1949) we said that the purpose of section 1090 is to prohibit a board charged with making state purchases from entering into a contract in a dual capacity.

In Stigall v. City of Taft (1962) 58 Cal.2d 565, a city advertised for bids on plumbing work and a company in which a city councilman had a substantial financial interest submitted the lowest bid. When conflict of interest objections were raised the matter was put over to the next meeting. At the next meeting the councilman in question submitted his resignation and thereafter the council awarded the contract to the lowest bidder. In an action to invalidate the contract the Supreme Court held that the prohibition of Government Code section 1090 against "making" a contract in which a member is financially interested embraces the negotiations leading up to the final award of the contract. The court observed:

> "Conceding that no fraud or dishonesty is apparent in the instant case, the object of the enactments is to remove or limit the possibility of any personal influence, either directly which might bear on an official's decision, as well as to void contracts which are actually obtained through fraud or dishonest conduct."

A copy of the Stigall case is attached.

In Thompson v. Call (1985) 38 Cal.3d 633, the city council indicated an interest in acquiring land owned by a council member for park purposes. The landowner councilman conveyed the land to a development company which then conveyed the land to the city. The court held the transaction violated

Government Code section 1090 since the company was just the conduit by which the councilman sold the property to the city. The court held the city was to keep the property and judgment against the councilman to repay the $258,000 purchase price to the city was affirmed. The court observed:

> "Moreover, California courts have consistently held that the public officer cannot escape liability for a section 1090 violation merely by abstaining from voting or participating in discussions or negotiations."

A copy of the Thompson case is attached.

In January 1977 this office issued a document entitled, "Conflict of Interest Laws Applicable to Government Agencies". (A copy of pages 61 and 62 of that document is attached) In discussing Government Code section 1090 we stated on page 62 of that document:

> "Unlike the PRA and section 8920 et seq. which permit abstention, section 1090 constitutes an absolute prohibition. Thus, if a board member has a conflict, and a 'remote interest' exception is not applicable (to be discussed infra), the board may not validly enter into a contract even if the member discloses his conflict and abstains. This distinction must be kept in mind when one considers both the section 1090 proscription, and the sanctions applicable to a violation of its provisions."

The foregoing authorities support our view that abstention from participation in the making of a contract in which a school board member has a financial interest does not satisfy the requirements of Government Code section 1090.

I trust the foregoing provides the advice you requested. If I may be of assistance on this matter, please do not hesitate to call.

Sincerely,

JACK R. WINKLER
Assistant Attorney General
Chief, Opinion Unit

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SUBCOMMITTEE ON TIMBER
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JOINT COMMITTEE ON PRISON CONSTRUCTION & OPERATIONS

312

February 13, 1986

John Van de Kamp
Attorney General
1515 K Street, Suite 511
Sacramento, Ca 95814

Dear John:

I am writing to request a written opinion regarding Government Code conflict of interest provisions for local elected officials.

Legislation that I authored which took effect on January 1 (AB 1849, Ch. 816, 1985 Statutes) brought school board members under the conflict of interest provisions in the Government Code that govern all other local elected officials. Previously, school board members were governed by provisions in the Education Code.

It recently came to my attention that a school board president resigned from office on the advice of the county office of education's legal counsel so that his wife could accept a teaching position with the district. The board president was advised that, based on a California Supreme Court decision (Thompson v. Call, 214 Cal. Rptr. 139, [Cal. 1985]), his mere presence on the board would constitute an unlawful conflict of interest under the Government Code if his wife was hired as a district employee. I have enclosed some correspondence which describes this incident in greater detail.

It was my understanding when AB 1849 was under legislative consideration that under the Government Code a local elected official with a conflict of interest on a matter before the body was simply required to refrain from participating in the matter in any way and to refrain from voting, and that there was no requirement that he or she resign from the body. Please provide me with an opinion as soon as possible on whether this is true, or whether an elected official's mere presence on a governing board constitutes an unlawful conflict of interest under the Government Code so that he or she must resign from the board.

Thank you in advance for your assistance.

Sincerely,

BYRON D. SHER, Assemblyman
21st District

BDS:jm
Enclosures

cc: Keith Hayenga

Keith Hayenga
1582 Creekside Drive
Petaluma, CA 94952

JAN 27 198

January 24, 1986

Byron D. Sher, Assemblyman
California Legislature
State Capital
Sacramento, CA 95814

Dear Mr. Sher,

Thank you for sending me information on your AB 1849 (Conflict of Interest - 1985). As I know you are aware, the legislation had an unfortunate impact upon our school district. It forced the resignation of our board president (SEE enclosed news clippings) who had just been re-elected to a new four-year term last November.

Your field representative, Christopher Carlisle, indicated that it is the understanding of your office that under Government Code 1090 a member can continue to serve when a spouse is hired by simply abstaining when required. Our legal counsel, Bob Henry of the Sonoma County Schools Office, advised us that this is no longer true. His opinion is based in the main upon dictum expressed by the California Supreme Court in Thompson v Call, 214Cal.Rptr.139 (1985). I have enclosed a pertinent page 149 of that decision.

The San Jose Mercury News clipping you sent me was dated March 25, 1985; the Legislative Counsel's opinion you provided was April 12, 1985. The Call case was decided May 23, 1985.

I feel that, relative to spousal employment, the law the way it is will not serve to prevent any harm to public education. What it will do is keep a board member here from serving or a teacher there from teaching and thereby undermine a system of volunteer and professional service. It unnecessarily threatens the institution of marriage in its modern context where spouses should be equal partners, free to pursue independent and separate careers. It therefore disserves the community, the home, and the welfare of children.

We all have to mitigate subjectivity and bias when employment choices are involved. But, under this rule, a superintendent may still secure employment for his mistress, a principal for a close friend, a union president for a live-in-lover (homosexual or heterosexual); yet we single out the bond between trustee and spouse as the only inappropriate one. I don't see any common sense or social good in that. Once in a while we need to back off and look at how the laws we make fit in the modern world and in what direction they send us.

I happen to disagree with an editorial from our local paper, the Argus-Courier, (enclosed with this letter) which suggests that your legislation should be repealed and the old rule reinstated. I think you took a step which added clarity to the law and set a universal standard. How different, after all, is a town councilman from a school board member? But, contracts of employment for services are not the same as quarter million dollar land deals - certainly the options available should be at least equal between the two.

My solution would be a revision to our family law which deals with community property (Civil Code 5100 et al). My suggestion is to allow a public official to sign a conveyance whereby the earnings of an affected spouse would be designated separate property. Then, in turn, you might add an OR condition to Government Code section 1091.5(a)(6) which would render the public official's interest "remote" if the requirements of the new Civil Code provision were met.

With my rule, the board member could continue to serve, the teacher could continue to teach, the kids could continue to go to college, and the whole community would be a better place.

I'm reminded of a movie some years back that I think was entitled "Adam's Rib" in which Spencer Tracy and Katherine Hepburn player married lawyer's who opposed each other in court. I think there was an ideal expressed in that movie which we need to respond to today.

Equality for women has brought many changes to our society. It has not done away with the principle that "no man can faithfully serve two masters." But, it has established that a man is not master over his wife or visa versa. Married couples must be allowed to be separate, unique and independent individuals and still support a home and children. If we do not allow that, the home and children will surely suffer from our rules.

I've looked at the husband/wife provisions of the Civil Code. They appear to be kind of a can of worms and not all that up-to-date. There's a lot of work that could be done there, but, I suspect, little lobby for doing it.

What I am proposing should be a relatively simply change. If you should decide to take on the challenge of the legislation I've outlined, I would be happy to help muster whatever citizen support you need.

Cordially yours,

Keith Hayenga, Trustee
Old Adobe Union School District

kh/KH

cc: Rebecca Baumann, Director, CSBA Office of Governmental Relations
Bob Henry, Legal Counsel, Sonoma County Schools Office
Barry Keene, Senate Majority Leader, California Legislature

New law forces trustee to resign

By ANNE DOLCINI
Argus-Courier Staff

Citing a brand-new California conflict-of-interest law, the president of the Old Adobe Union School District Board of Trustees resigned Thursday night rather than block his wife's employment as a part-time teacher in the district.

Oliver Deegan apparently is the first trustee in the state forced to step down because of AB 1849.

The bill, written by Assemblyman Byron Sher, D-Mountain View, became law on Jan. 1.

It brought school board members under the Government Code's strict conflict-of-interest rule.

Attorneys in the Sonoma County Office of Education's legal services department discovered the problem a week ago when Old Adobe Superintendent Donald Brann mentioned in passing that he was recommending the board president's wife for a position.

The lawyers dug into their legal books, consulted Sher's office and the California School Boards Association, and concluded that Mary Deegan could not be hired while Deegan was a trustee.

Oliver Deegan

After Deegan stepped aside last night, the remaining four board members voted unanimously to hire Mrs. Deegan as a part-time language arts instructor at Bernard Eldredge Elementary School. School Improvement Pro-

(See Deegan, Page 2A)

Deegan

(Continued from page 1)

gram funds will pay her salary. She starts work Monday.

Brann said if Mrs. Deegan had been hired in December, the new law would not have been a factor.

The new law covers only new hirings or changes in employment for a spouse who's worked a year or more, Brann said. Trustee Keith Hayenga's position is not affected by the new law because his wife, a substitute teacher in the district, has had no job change.

Previously, a board member simply would have abstained from voting for the hiring of a spouse.

But now, Brann said, "If a trustee has an interest in a (union) contract, the board can't enter into it period. If it happens and is challenged, the contract becomes void, and the board member would lose his seat and be prevented from ever serving again. He or she also would be subject to misdemeanor criminal penalties."

Brann said the situation was "really regrettable. It's such a surprise and shock to suddenly lose your board president.

"Ironically, Sher's office insists it was not their intent to have their action result in major change," Brann said. "All they intended to do was put the Government Code and the Education Code in sync. The legal advice that they received from the California School Boards Association did not point up that this was going to be a result of their bill."

Brann credited the district's attorneys with quick thinking and action.

He added, "I had no idea that in recommending Mrs. Deegan for employment I would be forcing a choice. It was just bad timing."

Brann said he read that 1,150 new bills took effect on Jan. 1, and "this one caught us."

Deegan said he resigned reluctantly, particularly because he had just been re-elected and chosen board president. "I felt a certain duty," he said.

But he said he had no trouble putting his wife's work before his position.

"Her career is very important to her," Deegan said. "She has taken time off to be home for the children and now it's very important that she be allowed to go ahead and pursue her career."

The Deegans are the parents of four, the youngest of whom is in kindergarten.

Deegan said his wife "feels bad," but quipped, "I can far more easily give up my salary, which was zero, than hers — even if they doubled my salary."

He said the new law was "a blow in the sense that it's already very difficult to get people to be school board members." Traditionally, spouses of people employed by school district have been interested in education and have run for trusteeships, he said.

Deegan works as a federal probation officer.

He was first sworn in as a board member on April 23, 1981.

opinions

an editorial comment

School board rule should be changed

A new state conflict-of-interest law affecting school boards has created an unfortunate set of circumstances in the Old Adobe Union School District, forcing the president of the board of trustees to resign. As demonstrated by this situation, the law is a poor one and should be changed.

Here is a case in which Oliver Deegan — who has served the board well for nearly five years, was recently elected to another four-year term and was named board president — has to step down because of a technicality involving the change in conflict-of-interest codes for school districts. He may be the first school trustee in the state forced to resign because of the law that went into effect Jan. 1. The law apparently was so obscure Old Adobe didn't even become aware of it until a couple of weeks ago when the district superintendent was recommending Deegan's wife for a part-time teaching position.

For years school boards were covered by the state Education Code conflict-of-interest regulations that prohibited board members from participating in a vote involving the hiring of a spouse. That's fair enough, and it seemingly took care of the conflict problem — until Mountain View Assemblyman Byron Sher decided to handle a problem in his district.

His bill, which was signed into law, brought school board members under the Government Code (instead of the Education Code) conflict-of-interest rules that forbid a person from holding office in a district where a spouse is *newly* hired. But if the spouse has been employed by the district for at least one year, a person can hold office.

What it boils down to is: Because Deegan's wife is changing from substitute teacher status to part-time teacher in Old Adobe, a man who has been an effective board member is off the board so is wife can take the teaching job. He should not have been placed in the position to have to make that decision. It's tough enough finding interested, quality people to serve on school boards.

We think the previous conflict-of-interest rule governing school boards was adequate and should be reinstated. And the Old Adobe District should be leading the way, pressing for the change.

New president for Old Adobe board

By ANNE DOLCINI
Argus-Courier Staff

Old Adobe Union School District trustee Susie Reno has been elected president of the board to succeed Oliver Deegan, who resigned last week.

Reno advanced from the vice president's position to the one-year term. It will be the first time she has served as president.

Keith Hayenga was elected vice president, and Susie Wright will remain clerk of the board.

Trustees also agreed to appoint Deegan's replacement rather than hold a special election, which would have cost the district about $13,000.

The board has 60 days to announce the vacancy, accept applications, interview candidates and choose a new trustee.

Deegan resigned "reluctantly" after county schools Superintendent Robert Henry advised that a new conflict-of-interest law forbade him from holding office if his wife was hired by the district.

Deegan apparently was the first board member in California affected by the new law. It carries misdemeanor punishments if broken.

Two other Sonoma County school districts are wrestling with the new rule but no more resignations have resulted, said Henry.

The problem arose when Mary Deegan was recommended as the new part-time language teacher at Bernard Eldredge School.

Effective Jan. 1, the new law repealed state Education Code conflict-of-interest rules, which for decades simply let trustees abstain from voting to hire a spouse.

Instead, school board members were brought under the Government Code rule that forbids anyone from holding office in a district where a wife or husband is newly hired.

However, if the spouse has been employed for one year or more, the Government Code allows a person to hold office.

The change was instituted by Assemblyman Byron Sher to solve a conflict problem in his South Bay district, where a board member was married to a teachers' union negotiator.

The Deegans were affected because Mrs. Deegan was changing from substitute to part-time teaching. Deegan stepped down so he would not block the hiring.

Henry said Sher's office told him it didn't intend to force resignations.

Henry said he thinks the public would be better served if the Education Code conflict-of-interest rules were reinstated.

But it could take months to pass such legislation, he said — too late for Deegan to apply for his old position.

pron v. Hitchcock (1893) 98 Cal. 427, 33 P. 431.)

[9] Moreover, California courts have consistently held that the public officer cannot escape liability for a section 1090 violation merely by abstaining from voting or participating in discussions or negotiations.[23] (*Stigall, supra*, 58 Cal.2d at pp. 570–571, 25 Cal.Rptr. 441, 375 P.2d 289; *Hobbs, Wall & Co., supra*, 109 Cal.App. at p. 319, 293 P. 145.) Mere membership on the board or council establishes the presumption that the officer participated in the forbidden transaction or influenced other members of the council. (*Stigall, id.*; *Fraser-Yamor Agency, Inc., supra*, 68 Cal. App.3d at pp. 211, 215; *Hobbs, Wall & Co., supra*, 109 Cal.App. at p. 319, 293 P. 145. See, also, *Kennedy & Beck, supra*, at pp. 340–341; *Kaufmann, supra*, at p. 196.) Similarly, the full disclosure of an interest by an officer is also immaterial,[24] as disclosure does not guarantee an absence of influence. To the contrary, it has been suggested that knowledge of a fellow officer's interest may lead other officers to favor an award which would benefit him.[25]

[10] The case law supports strict enforcement of conflict-of-interest statutes. Mitigating factors—such as Call's disclosure of his interest in the transaction, and the absence of fraud—cannot shield Call from liability.[26] Moreover, the trial court's remedy—allowing the city to keep the land and imposing a money judgment against the Calls—is consistent with California law and with the primary policy concern that every public officer be guided solely by the public interest, rather than by personal interest, when dealing with contracts in an official capacity. Resulting in a substantial forfeiture, this remedy provides public officials with a strong incentive to avoid conflict-of-interest situations scrupulously.

On the other hand, the forfeiture in this case is undeniably harsh in light of the absence of fraud and Call's partial reliance upon advice given by the city attorney. Also, beyond the effect of the trial court's decision on the Calls, it has been suggested that such a harsh prohibition of financial

23. See, e.g., *City of Imperial Beach, supra*, where a councilwoman possessed an interest in a concession stand on a municipal pier. The question in the action by the city for declaratory relief was whether the city council could renew or extend a contract it had with the concession operators. Because the city council would have to approve any such renewal and the contract rates, the court held that it would be prohibited under section 1090, even if the councilwoman abstained from voting: "It is not her participation in the voting which constitutes the conflict of interest, but her potential to do so." (103 Cal.App.3d at p. 195, 162 Cal.Rptr. 663.)

24. See *Berka, supra*, 125 Cal. at page 129, 57 P. 777; *Stockton Plumbing & Supply Co., supra*, 68 Cal.App. at page 603, 229 P. 1020.

25. *Kaufmann, supra*, at page 196. We recognize the difficulty faced by a public officer who—for reasons beyond his control—finds himself in a potential conflict-of-interest situation. In addition to fully disclosing the interest, abstaining from relevant votes and discussions, seeking the advice of the city attorney, and refraining from taking advantage of the situation, it has been suggested that he could divest himself of the interest (prior to official action) or, in some instances, actually resign from his office. (*People v. Darby, supra*, 114 Cal.App.2d at p. 426, 250 P.2d 743.) Resignation from office does not, however, appear to be a viable alternative; indeed, it may be counter to the public interest in retaining competent public officers. In the instant case, Call was under no compulsion to negotiate with or sell the parcel to IGC. He could have simply informed IGC that to sell his land to the city, using IGC as a conduit, would place him in a conflict-of-interest situation; he would thereby have avoided any interaction with IGC which might implicate him in the $600,000 plan. If, after IGC's performance of the $600,000 plan, the city still wished to acquire the Calls' parcel, it could have done so through eminent domain.

26. We note, also, that this case does not confront us with a purely innocent or unknowing violation of the statute. Knowing that the city would be purchasing the property, Call negotiated for the $258,000 selling price which the evidence suggested may be well above fair market value. He did vote on some of the relevant matters, and his consultations with the city attorney and abstinence from certain votes appear to satisfy niceties of form rather than the substantial ethical demands of his public office. Moreover, Call insisted upon the easement, thereby considerably diminishing the value of the land which he knew was to be purchased by the city.

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OFFICE OF THE ATTORNEY GENERAL
State of California

JOHN K. VAN DE KAMP
Attorney General

OPINION of JOHN K. VAN DE KAMP Attorney General CLAYTON P. ROCHE Deputy Attorney General	No. 85-1105 MAY 16, 1986

THE HONORABLE CHARLES R. MACK, COUNTY COUNSEL, COUNTY OF YOLO, has requested an opinion on the following questions under the provisions of chapter 816, Statutes of 1985:

A member of a school district governing board, whose term of office commenced in December 1983, is married to a tenured teacher, whose employment with the school district commenced in September 1983. Does section 1090 of the Government Code prohibit the school district board from entering into an annual collective bargaining agreement with a teachers' association which represents the board member's wife either during his current term of office, or during a future term if re-elected? If not, may the board member participate in the making of such contract?

CONCLUSIONS

Under the facts stated above, section 1090 of the Government Code literally prohibits a school district board from entering into an annual collective bargaining agreement with the teachers' association during the board member's current term of office. However, such agreement can still be entered into under the "rule of necessity."

If the board member is re-elected, section 1090 of the Government Code would not prohibit the collective bargaining agreement by virtue of the provisions of section 1091.5, subdivision(a)(6) of the Government Code.

During his current term of office, the board member should abstain from participation in the making of the annual collective bargaining agreement. He may, however, participate in its making during a future term of office if he is re-elected.

ANALYSIS

This request for our opinion arises from the enactment of chapter 816, Statutes of 1985. That statute made the general contractual conflict of interest provisions of section 1090 et seq. of the Government Code applicable to school board members. Prior thereto, they were governed by special provisions contained in the Education Code.1/ Accordingly, section 33233 of the Education Code was repealed and re-enacted to read:

> "The prohibitions contained in Article 4 (commencing with Section 1090) and Article 4.7 (commencing with Section 1125) of Division 4 of Title 1 of the Government Code are applicable to members of governing boards of school districts."

Education Code sections 35234 through 35238, which governed contractual conflicts of interest, were repealed.2/

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1. School board members were, of course, and still are also subject to the conflict of interest provisions of the Political Reform Act of 1974, Government Code section 87100 et seq. That law, however, does not preclude the enactment of or application of nonconflicting additional conflict of interest provisions. (Gov. Code, § 81013.)

Additionally, since 1955 (Stats. 1955, ch. 1125, § 4), school board members have been subject to the sanctions provided for under the general contractual conflict of interest provisions. Government Code, section 1097 provided, and provides:

> "Every officer or person prohibited by the laws of this state from making or being interested in contracts, or from becoming a vendor or purchaser at sales, or from purchasing scrip, or other evidences of indebtedness, <u>including any member of the governing board of a school district,</u> who willfully violates any of the provisions of such laws, is punishable by a fine of not more than one thousand dollars ($1,000), or by imprisonment in the state prison, and is forever disqualified from holding any office in this state." (Emphasis added.)

2. Similar changes were made to the parallel provisions applicable to community college district board members contained in the section 72000 series of the Education Code.

(Contd.)

Both the California Supreme Court and this office have had the occasion recently to set forth the general provisions and principles governing the operation of section 1090 et seq. of the Government Code. (See Thomson v. Call (1985) 38 Cal.3d 633; 67 Ops.Cal.Atty.Gen. 369, 375-378 (1984); 66 Ops.Cal.Atty.Gen. 156 (1983).) Reference is made to those opinions for a discussion of those principles. Suffice it to say at this point that section 1090 et seq. of the Government Code prohibits any public officer or employee from having any financial interest, direct or indirect, in any contract made by him in his official capacity, or by any board or commission of which he is a member. Excepted from the strictures of this rule are certain "remote interests" set forth in section 1091 of the Government Code and certain "non-interests" set forth in 1091.5 of that code. Where the section 1090 prohibition is applicable, the prohibition acts as an absolute bar to a board or commission entering into the prohibited contract. This is true even if the interested board member completely abstains from any participation in the matter. The one exception to this is if, under the particular circumstances of the case, the "rule of necessity" can be applied. Contracts made in violation of section 1090 are generally void.3/

The repealed provisions of the Education Code were to some degree less stringent. Thus, under prior sections 35234 and 35235 of the Education Code, a school board could

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2. (Contd.)

Section 1125 et seq. of the Government Code governs "incompatible activities" of officers and employers of local agencies.

3. Thomson v. Call, supra, 38 Cal.3d 633 is an excellent example of the manner in which the courts strictly enforce section 1090. In that case Call, a city councilman, was one of the parties to a multiparty transaction with the city whereby a developer agreed to acquire property and donate it to the city for park purposes in exchange for favorable rezoning and the issuance of use and building permits for its development project. The developer acquired Call's property for $258,000.00 for conveyance to the city, which the court characterized as Call having actually sold such property to the city, using the developer "as a conduit." (Id., at p. 646.)

(Contd.)

enter into a contract despite the interest of one of its members if the contract was "just and reasonable", full disclosure had been made publicly by the board member in advance, the contract was not with the board member himself, and his vote was not necessary.4/

In relatively recent years both the courts and this office have examined in detail the application of prior

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3. (Contd.)

The court voided the transaction; permitted the city to retain title to the property; and also required Call to forefeit the $258,000.00 purchase price to the city. The court noted, after having reviewed the authorities:

> " . . . As we have seen, civil liability under section 1090 is not affected by the presence or absence of fraud, by the official's good faith or disclosure of interest, or his nonparticipation in voting; nor should these considerations determine the civil remedy. (Id. at p. 652.)

4. Section 35233 provided: "No member of the governing board of any school district shall be interested in any contract made by the board of which he is a member."

Section 35234 provided:

> "Except as provided in Section 35235, no contract or other transaction entered into by the governing board of any school district is either void or voidable under the provisions of Section 35233, nor shall any member of such board be disqualified or deemed guilty of misconduct in office under said provisions, if the circumstances specified in the following subdivisions exist:
>
> "(a) The fact of such interest is disclosed or known to the governing board and noted in the minutes, and the governing board thereafter authorizes, approves, or ratifies the contract or transaction in good faith by a vote sufficient for the purpose without counting the vote or votes of such interested member or members, and
>
> "(b) The contract or transaction is just and reasonable as to the school district at the time it is authorized or approved."

(Contd.)

sections 35234 and 35235 (then §§ 1174 & 1174.5) of the Education Code with reference to possible conflicts of interest where a school board member's spouse was a certificated employee of the school district.

Thus, in Coulter v. Board of Education (1974) 40 Cal.App.3d 445, the court held that then sections 1174 and 1174.5 permitted a school board to unanimously vote to increase the salary and benefits of all school district employees despite the fact that one board member's spouse was a tenured teacher. The court concluded that all conditions requisite to a finding that the transaction was "just and reasonable" under the Education Code had been met. The court also held that the conflict of interest provisions of the Education Code could constitutionally apply and prevail over the more general provisions of section 1090 et seq. of the Government Code.

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4. (Contd.)

Section 35235 provided:

"The provisions of Section 35234 shall not be applicable if the circumstances specified in any of the following subdivisions exist:

"(a) The contract or transaction is between the school district and a member of the governing board of that district.

"(b) The contract or transaction is between the school district and a partnership or unincorporated association of which any member of the governing board of that district is a partner or in which he is the owner or holder, directly or indirectly, of a proprietorship interest.

"(c) The contract or transaction is between the school district and a corporation in which any member of the governing board of that district is the owner or holder, directly or indirectly, of five percent (5%) or more of the outstanding common stock.

"(d) A board member is interested in a contract or transaction within the meaning of Section 35233 and, without first disclosing such interest to the governing board at a public meeting of the board, influences or attempts to influence another member or members of the board to enter into the contract or transaction."

Thereafter, in 61 Ops.Cal.Atty.Gen. 412 (1978) this office was asked (1) whether a school district board member could participate in contract negotiations with an employees' bargaining unit to which his spouse belonged; (2) whether the answer would be different if the spouses had agreed to transform the contract benefits into separate property; and (3) whether the answer would be different if the spouse were a certificated as opposed to a noncertificated employee.

Accordingly, in 61 Ops.Cal.Atty.Gen. 412 (1978) we were faced with the question as to the effect of Coulter v. Board of Education, supra, 40 Cal.App.3d 445 on prior opinions of our office. We summarized the pre-Coulter law as follows:

> "Prior to 1974 this office has held that contracts or other transactions between a school district and a board member's spouse would fall within the proscription of the Education Code conflict of interest provisions. This was predicated upon the community property interest of the board member in the spouse's contracts, and the proscription found now in section 35235, subdivision (a), previously sections 1011.2 and 1175, and subdivision (a) thereof. Thus, in 26 Ops.Cal.Atty. Gen. 281, 282 (1955), we held that the following contracts or transactions would be prohibited and void by virtue of conflicts of interests of the board member:
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> "'. . . . . .
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> "'(2) Where the wife of a board member would serve as secretary of the district, handling records, correspondence, etc.'
>
> "'(3) Where the wife of a board member would transport pupils to the district school, including both her own children and those of certain other board members.'
>
> "Our holding in 26 Ops.Cal.Atty.Gen. 281, supra, on these contracts applied even if the board member and his wife agreed that their earnings should be her separate property. We so held on the grounds that, since the wife's separate property was still liable for necessities provided both spouses, the husband retained a prohibited interest in his wife's contracts. (See Nielsen v. Richards (1925) 75 Cal.App.680; Reece v. Alcoholic Bev. Etc. Appeals Bd. (1976) 64 Cal.App.3d 675, 683.) In sum, we held, at page 285:

"'We accordingly conclude that a contract between the district and the wife of a board member of that district is a contract with the community, and, as a matter of law, with the board member itself.'

"See also 3 Ops.Cal.Atty.Gen. 333 (1944), holding that it would require an amendment to section 1011 of the Education Code (now section 35233, supra) to permit a school board member to serve on a district board in the same school district in which his wife is a tenured teacher; letter opinion I.L. 65-146, motion of school district board to raise salaries invalid for the reason, inter alia, that spouse of a trustee was a tenured teacher." (61 Ops.Cal.Atty.Gen. at p. 417.)

We concluded in 61 Ops.Cal.Atty.Gen. 412 (1978) that Coulter v. Board of Education, supra, 40 Cal.App.3d 445 did in fact change the result of our pre-Coulter opinions decided under the Education Code. Accordingly, we concluded that no conflict of interest would occur under sections 35233 through 35235 of the Education Code and therefore (1) it made no difference whether there was a spousal agreement or not to transmute the spouse's earnings into separate property and (2) it made no difference whether the spouse was a certificated or non-certificated employee. We stated in part:

"In short, the court of appeal [in Coulter] held that a school board member may, without violating former section 1174 of the Education Code (now section 35233, supra) vote upon a labor agreement which will beneficially effect his or her spouse who is employed by the school district so long as the conditions set forth in former section 1174.5 of the Education Code (now section 35234, supra) are met by the board member. The court of appeal so held being fully aware of the provisions of then section 1175 of that Code (now section 35233 [35235], supra) and the trial court's holding with respect thereto. It also was certainly fully cognizant of California's community property laws which would, unless agreed to otherwise, give the board member a clear financial interest in the spouse's earnings (Civ. Code § 5100 et seq.). No such agreement was alluded to in the case. Thus, it is the opinion of this office that Coulter v. Board of Education, supra, 40 Cal.App.3d 445 is controlling on the facts presented in the instant request for our opinion. We perceive no distinguishing facts from those in Coulter. Furthermore, Coulter considered and applied all the pertinent provisions of the Education Code.

"Insofar as the court of appeal in Coulter did not discuss nor attempt to distinguish Neilsen v. Richards, supra, 75 Cal.App. 680, we note that that case involved a conflict of interest question with respect to a county superintendent of schools, not a school board member. Consequently, the case was decided under the predecessor provisions to section 1090 of the Government Code, and common law principles, and not the predecessors to the present Education Code provisions that are controlling herein. Therefore, the Neilsen case cannot be considered to be in direct conflict with the Coulter case." (61 Ops.Cal.Atty.Gen. at p. 422.)

We further pointed out that since Coulter had considered all pertinent provisions of the Education Code, it in effect sub silentio had concluded that the community property interest of the board member in his spouse's contract was not a contract with himself within the meaning of the section 1175, subdivision(a) (later Ed. Code, § 35235, subd. (a).)

The significant point for our present consideration is that Coulter v. Board of Education, supra, 40 Cal.App.3d 445 did not in any way overrule the holding in Neilsen v. Richards (1925) 75 Cal.App. 680.

Thus, school boards have been "transferred" for contractural conflicts of interest purposes from the repealed Education Code provisions to sections 1090 et seq. of the Government Code with no greater or lesser rights than other officers and employees with respect to their community property interests in their spouses' contracts and other financial affairs. This being so, we believe our opinion in 65 Ops.Cal.Atty.Gen. 305 (1982) is now determinative and controls most of the questions presented in this request for our opinion.

In that opinion we were presented with the situation where a county superintendent of schools was elected to a four-year term commencing in January 1979. As such, he was the employer and appointing power for all classified civil service employees in his office. His office had entered into a memorandum of understanding (MOU) relating to wages, hours and working conditions with his classified employees which was to remain in force until June 30, 1983. The MOU, however was subject to modification while in force.

In August 1981, during his term, he married one of the classified employees in his office. The question presented was:

". . . whether section 1090 of the Government Code prohibits the superintendent from agreeing to modify the current MOU, or prohibits him from entering into a new one should he be reelected, while his wife continued in her civil service employment." (65 Ops.Cal.Atty.Gen. at p. 306.)

We concluded:

". . . that section 1090 prohibits neither of these official actions by the superintendent despite his wife's continued employment. As to the current MOU, we conclude that the 'rule of necessity' would apply. As to a new MOU should he be reelected, we conclude that the 'non-interest' exception to section 1090 of the Government Code contained in section 1091.5, subdivision(a)(6) would apply at such time." (65 Ops.Cal.Atty.Gen. at p. 307.)

In reaching our conclusion we recognized that MOU's or modifications thereof were contracts within the prohibition of section 1090 of the Government Code.5/ In reaching our conclusion we also recognized that the superintendent, either in making or participating in the making of an MOU or modifications thereto, would fall within the prohibition of section 1090. We did so by concluding as we had in our prior opinions that the superintendent would have an inescapable community property interest in his wife's earnings and other economic benefits of the MOU, and accordingly would be "financially interested" in the MOU or its modification.

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5. Section 1090 provides:

"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."

Then noting that none of the "remote interests" set forth in section 1091 of the Government Code were germane, we went on to examine the "non-interests" set forth in section 1091.5 of the Government Code, and found one to be relevant. That was subdivision(a)(6) thereof. It 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."

We accordingly found this "non-interest" to be facially inapplicable to the superintendent during his current term, since the marriage occurred during his term. We, however, concluded as to the new term that "it would clearly apply." (65 Ops.Cal.Atty.Gen. at p. 311.) Thus, during a future term there was no prohibition as to his entering in an MOU or modification thereof under section 1090 of the Government Code.

As to his current term, we applied the "rule of necessity" to permit the superintendent to enter into modification of the MOU. After reviewing the history of the rule at some length, we stated:

> "With respect to contractual conflicts of interest the 'rule of necessity' may be said to have two facets. The first, which is not involved herein, arises to permit a governmental agency to acquire an essential supply or service despite a conflict of interest. The contracting officer, or a public board upon which he serves, would be the sole source of supply of such essential supply or service, and also would be the only official or board permitted by law to execute the contract. Public policy would authorize the contract despite this conflict of interest. (See 59 Ops.Cal.Atty. Gen. 604, 619 n.18, and opinions cited therein.) The second facet of the doctrine, exemplified in Caminetti v. Pac. Mutual Ins. Co., supra, [22 Cal.2d 344 (1943)] arises in nonprocurement situations and permits a public officer to carry out the essential duties of his office despite a

conflict of interest where he is the only one who may legally act. It ensures that essential governmental functions are performed even where a conflict of interest exists.

"Reasoning from the Caminetti case, and the principles stated therein, we believe the superintendent is qualified to act with respect to his employees in cases where only he can legally act, such as with respect to the MOU. Otherwise, no action could or would be taken. All of the employees of his office would then be denied the benefits of collective bargaining under the Rodda Act or the benefits which might be derived from the wage adjustments under the current memorandum of understanding. The need for the application of the 'rule of necessity' in such cases is patent." (65 Ops.Cal.Atty.Gen. at p. 310, fns. omitted.)6/

Nor did we believe that either the superintendent or his wife should be required to resign to avoid the conflict of interest and the application of the rule of necessity. With respect to the superintendent, we stated:

"It might be urged, however, that the 'rule of necessity' should not be applied to our facts herein because the superintendent caused his own

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6. We would note that the "rule of necessity" is to reflect actual necessity after all possible alternatives have been explored. Thus, in prior opinions of this office we have concluded in procurement situations that

". . . This rule would apply only in cases of real emergency and necessity. An event that can be reasonably anticipated, such as the repeated failure of a [car] battery or the necessity for periodic service, would not be considered an emergency." (4 Ops.Cal.Atty.Gen. 264 (1944); see also 57 Ops.Cal.Atty.Gen. 458, 463-465 (1974).)

Likewise, if a public entity requires real property for its use which is owned by an officer who would fall within the proscription of section 1090 of the Government Code (see, e.g. Thomson v. Call, supra, 38 Cal.3d 633), the entity need not rely upon the "rule of necessity." It need only exercise its power of eminent domain. (See, e.g. 26 Ops.Cal.Atty.Gen. 5 (1955).)

'conflict' by marrying an employee in his office. Our research has disclosed no such limitation upon the rule. Furthermore, the application of such a limitation would mean that the superintendent should resign to both avoid the conflict and assure that essential governmental functions will continue to be performed.

"We believe, however, that at least under the facts herein, the superintendent need not resign. First of all, as an elective official, he has been placed in office by the people. The electorate have a right to expect that he will serve unless he voluntarily resigns from office or is removed from office under clearly established procedures for removal (e.g., recall by the electorate, see Elec. Code. § 27000 et seq., or removal for willful or corrupt misconduct in office, Gov. Code, § 3060 et seq.). Secondly, the fact of marriage to an employee in his office constitutes neither a disqualification for running for such office nor from continuing in office. (See Ed. Code, § 1207.) And finally, since the United States Supreme Court has recognized that the 'freedom to marry has long been recognized as one of the vital personal rights to an orderly pursuit of happiness by free men' and that '[m]arriage is one of the "basic civil rights of men." fundamental to our very existence and survival' (Loving v. Virginia (1967) 388 U.S. 1, 12), we should avoid an interpretation of the law which could be construed as an impediment to, and a punitive measure taken because of, marriage. (See also, Zablocke v. Redhail (1978) 434 U.S. 374 firmly establishing a constitutional right to marriage.) The 'rule of necessity' permits us to avoid such a construction." (65 Ops.Cal.Atty.Gen. at p. 311, fns. omitted.)

And as to his wife, we stated in footnote 10:

"One might also urge that, alternatively, his wife should resign to avoid any conflict. We reject such an alternative for several reasons. First of all, any conflict which might arise under section 1090 of the Government Code would be with respect to the superintendent's official action, not his wife's. Accordingly, she should not be required to resign when she herself would be doing nothing legally wrong where only he has acted. Secondly, she is a permanent civil service

employee. As such she has the right to be terminated only in accordance with the 'Merit System Rules for Classified Employees of the Santa Cruz County Office of Education,' section 6.600 et seq."

It would seem that our opinion in 65 Ops.Cal.Atty. Gen. 305 (1982) is virtually on "all-fours" with the situation presented in this instant opinion request.

We are also presented herein with a collective bargaining agreement to be entered into pursuant to the Rodda Act (Gov. Code, § 3540 et seq.) in which the husband-contractor has a financial interest by virtue of his wife's employment with the contracting public entity. We are also presented with the situation where the wife is a permanent employee of the public entity by virtue of her tenured status with the school district. As such, she cannot be terminated by the school board except for cause. (See Ed. Code, §§ 44884, 44932.) Accordingly, her position is analogous to the permanent civil service employee-wife we dealt with in 65 Op.Cal.Atty.Gen. 305 (1982).7/

Thus, there appears to be only two real factual differences between the instant opinion and our 1982 opinion. The first is that in our 1982 opinion we were dealing with a single officer instead of a multi-member board. The second is that in the present situation the board member was married at the time he was elected (but still not long enough to apply the noninterest provision of section 1091.5, subdivision(a)(6) to his current term).

In a recent comprehensive opinion on conflicts of interest, this office anticipated the possibility of applying the "rule of necessity" to a multimember board under section 1090 where a single member had a financial interest in a contract. We stated in 67 Ops.Cal.Atty.Gen. 369, 378 (1984) with respect to a possible conflict of interest of a single member, referring back to our 1982 county superintendent of schools opinion:

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7. Accordingly, we do not attempt to meet herein any issue which might be raised if the wife were a non-tenured and hence not a "permanent" school district employee whose "contract" is renewed from year to year by operation of law. If such were the case, we would have to scrutinize the underlying contract of employment to determine the ability or not of the district board to exercise an option not to rehire her. Such an option might obviate the need to apply the "rule of necessity" to a prospective annual collective bargaining agreement.

"If an analysis of a particular contractual situation discloses that the supervisor-director has a 'financial interest' in a contract proposed to be entered into by the agency which neither qualifies as a 'remote interest' nor a 'noninterest' such fact does not mean that the agency board is always powerless to enter into contracts which are necessary or proper to carry out its statutory duties and powers. Engrafted upon the section 1090 proscription is the 'doctrine of necessity.' This doctrine was explained in detail and applied by this office in a relatively recent opinion, 65 Ops. Cal.Atty.Gen. 305 (1982). Reference is made to that opinion for such detailed analysis. The doctrine permits governmental officers or agencies to carry out essential duties despite conflicts of interest where only they may act.

"A perusal of 65 Ops.Cal.Atty.Gen. 305, supra, will disclose two bases for the doctrine. One is that it has its origins in the common law. The other is one of the presumed intent of the Legislature. This latter basis appears particularly germane herein with respect to agency contracts. It is to be recalled that in 1979, when the Legislature amended section 7 of the Agency Act to require service of two local representatives on the agency board, it was fully aware that representatives might be chosen from districts where land ownership was required for election or appointment to office. Thus, the Legislature was fully aware that the agency, in carrying out its essential functions, would encounter situations where conflicts of interest might arise as to the two local representatives. The Legislature could not have intended that the agency should be powerless to act because of such conflicts.

"Accordingly, the doctrine would permit the agency board to enter into contracts to carry out its essential functions despite the conflict of interest of one or more board members. The affected director(s) should, however, abstain either under common law concepts or under the appropriate PRA analysis as determined by the FPPC." (67 Ops.Cal.Atty.Gen. at p. 378, emphasis added, fns. omitted.)8/

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8. We are not asked about nor do we discuss herein the Political Reform Act (PRA) aspects of this matter. (See, 67 Ops.Cal.Atty.Gen. 369, 374 (1984): such matters should be addressed to the Fair Policial Practices Commission.)

Thus, we not only recognized the potential applicability of the "rule of necessity" to multimember boards under section 1090 of the Government Code, but we also recognized that, since the rule is not set forth in the code, nothing in the code itself would require abstention. We stated, however, that abstention should be the course to be followed. This approach is logical and we reaffirm it herein. To conclude otherwise, and permit participation of the financially interested board member, would stretch the "rule of necessity" well beyond the bounds of necessity.9/

With respect to the second factual distinction between our present case and that considered in our 1982 opinion, that is, that the marriage in the instant opinion preceded the board member's election to office, we believe that the reasoning of our 1982 opinion, set forth at length above as to why neither the superintendent of schools nor his permanent civil service wife should be required to resign, is equally applicable to the board member herein and his tenured-teacher wife.

Accordingly, based upon the foregoing analysis we reach the following conclusions as to the school board and the school board member involved herein:

1. Section 1090 of the Government Code would literally prohibit an annual collective bargaining agreement between the school board and the teachers' association during the board member's current term. However, such an agreement could still be entered into under the "rule of necessity."

Further, if the board member is re-elected, section 1090 of the Government Code would not prohibit the employees' annual agreement by virtue of the "non-interest" provisions of section 1091, subdivision(a)(6) of the Government Code.

2. The collective bargaining agreement could be rendered void if entered into during the board member's current term with his participation. Contracts entered into in

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9. In so concluding, we note possible language or implications in some older decisions involving public improvement assessment proceedings indicating that the interested official may still act. (See, e.g., Federal Construction Co. v. Curd (1918) 179 Cal. 489; Jeffery v. City of Salinas (1965) 232 Cal.App.3d 29, 40, fn.5; Raisch v. Sanitary Dist. No. 1 (1952) 108 Cal.App.2d 878, 884.)

We would not counsel such an approach based upon these cases, and believe they should be narrowly construed and restricted to their facts. (Compare 61 Ops.Cal.Atty.Gen. 243, 253-255 (1978).)

violation of section 1090 are void. (See Thomson v. Call, supra, 38 Cal.3d 633, 646, fn. 15.) Failure to properly adhere to the "rule of necessity" by abstention could constitute a violation of section 1090.

As to a future term, section 1091.5 subdivision (a)(6) would completely remove any section 1090 proscription. Accordingly, the collective bargaining agreement would be valid with or without the interested board member's participation.

3. Since a violation of section 1090 of the Government Code subjects an official to possible criminal sanctions and disqualification from office under section 1097 of the code, those sanctions could be applied if the board were to enter into a collective bargaining agreement with the interested members' participation. That participation would go beyond the bounds of the "rule of necessity."

As to a future term of office, no proscription would be applicable under section 1090 of the Government Code. Accordingly, no sanctions would be applicable.

4. Section 1090 of the Government Code would not prohibit the school board member from participating in negotiations with the teachers' association during a future term of office. He should, however, abstain from any and all participation during his current term of office under general common law principles.

* * * *