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Agenda Item: ID#15-117

Date: 2/26/15



Supplemental Information Packet

Agenda Related Item(s) – ID#15-117

Contents of Supplement: Conflict of Interest Letter on proposed appt. to the Employee Retirement Board

Approve the appointments of R. Renena Smith to the City of Fresno Employees Retirement Board and Barry Falke to the Housing and Community Development Commission

Item(s)

Supplemental Information:

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Post Office Box 8074
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February 24, 2015

Fresno City Council
c/o Fresno City Clerk
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Fresno, California 93721

CITY CLERK, FRESNO CA

SUBJECT: PROPOSED APPOINTMENT OF ASSISTANT CITY MANAGER AS
TRUSTEE FOR THE EMPLOYEES RETIREMENT SYSTEM (ERS),
CITY COUNCIL AGENDA ID #15-117 FOR FEBRUARY 26, 2015

Dear Council President Baines and Members of the City Council:

I am submitting this letter as a member of the Employees Retirement System, and not as a member or officer of any bargaining group. This letter has not been authorized, or even reviewed, by any member of a City bargaining group.

When I heard that Assistant City Manager Renena Smith was proposed for appointment to the ERS Board of Trustees, I remembered the conflict of interest problem that former City Manager Mark Scott's appointment to the Retirement Board had raised just a few years ago. Attached to this letter are the very thorough memoranda produced by the Retirement Systems' counsel, Saltzman & Johnson. These memoranda clearly explain salient conflict of interest issues that arise under California Government Code (GC) Section 1099 when a public officer (*i.e.*, an executive level manager at the City) is appointed to a pension board.

I believe that Ms. Smith's appointment could create conflicts of interest under GC §1099. The job specification for Assistant City Manager (attached) is almost identical to that of the City manager. Ms. Smith has oversight over City departments which employ other Retirement Board Trustees. The profile posted for Ms. Smith on the City Manager's website (copy attached) says that the following departments report directly to her:

- Finance, where elected Trustee Phillip Hardcastle works; and
- Personnel, where management-appointed Trustee T.J. Miller works.

The online profile for Ms. Smith also notes that Fresno-Yosemite Airport department directly reports to her. Elected Trustee David Cain works at Chandler Airport, which could be presumed to also report to Ms. Smith because ~~and~~ both airports are included in the City's "Airports" department.

These Trustees may be concerned that opposing Ms. Smith on an issue before the Board may cause some form of job retaliation. Thus, Ms. Smith would unavoidably be in a position to influence, to some degree, and even unintentionally, the votes taken by a majority of the ERS Board of Trustees (3 members, including herself), perhaps a super-majority (4 members). This is one reason that GC §1099 calls out these potential conflicts of interests in its "doctrine of incompatible offices." (I was listening when we had AB 1234 training.)

Other reasons include the fact that Ms. Smith is in charge of City budget preparation and labor relations, roles which create an obvious "clash of loyalties" with responsibilities of a pension board Trustee whose duties are to members of the Employees Retirement System.

Unfortunately, the Council was not given any information regarding GC §1099 issues in the agenda report for this proposed appointment (copy of ID#15-117 attached). The previous fracas over Mr. Scott's appointment was recent enough that I'm surprised the Council was not briefed on this issue more thoroughly in the agenda report. I recall that the City Council considered a subsequent agenda item about two months after its initial ratification of Mr. Scott's appointment, in order to try to provide "express legal authorization" – but, even then, the conflict of interest issues were not satisfactorily resolved (hence Saltzman & Johnson's February 3, 2012 memorandum). It was just lucky that no parties brought a *quo warranto* action to challenge Mr. Scott's appointment. (He attended few Retirement Board meetings after his appointment; that may have prevented him from taking actions as Trustee which would have manifested conflicts of interest with his role as City Manager.)

I would request that the Council hold this appointment in abeyance until an opinion may be obtained from the Attorney General on the issue. That was recommended back in 2011 (see page 9 of the attached Saltzman & Johnson memorandum). That is still a very good idea. There is no way to predict whether, or when, a party might bring a *quo warranto* action against Ms. Smith's appointment, and it would be an unnecessary legal expense for the City to defend against such an action when it could instead be prevented.

Page 9 of that Saltzman & Johnson memorandum further outlines the consequences of a GC 1099 conflict of interest: "automatic vacating of [the appointee's] first office." It would be a shame if the City were deprived of Ms. Smith's services in her Assistant City Manager role, due to an appointment to the Retirement Board which was not thoroughly considered and cleared in advance.

Sincerely,



Sandra L. Brock

Enclosures: Memoranda prepared by Saltzman & Johnson dated December 6, 2011 and February 3, 2012
Job Specification for Assistant City Manager
Assistant City Manager Renena Smith profile on City Manager web page
City Council Agenda Report ID# 15-117

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MEMORANDUM

TO: City of Fresno Retirement Boards
FROM: Russ Richeda, Legal Counsel
DATE: December 6, 2011
RE: Analysis of City Manager as a Member of the Employees Retirement Board Under the Incompatible Offices Doctrine

QUESTION PRESENTED

Does the doctrine of incompatible offices as set forth in Government Code section 1099 preclude an individual from simultaneously serving as City Manager of the City of Fresno and serving as a member of the Employees Retirement Board?

This office has addressed this memorandum to both retirement boards, notwithstanding that the issue more immediately concerns the Employees Retirement Board. This office has done so because it received a joint direction from both boards to prepare this memorandum. In addition, the retirement boards jointly consider a number of important issues, including investment issues, on their joint agendas. Accordingly, each retirement board possesses an on-going interest in the composition of the other board.

SUMMARY OF BACKGROUND LAW

Government Code section 1099 sets forth the doctrine of incompatible offices. That doctrine states in essence that the same individual cannot serve in two offices where to do so would create a clash of loyalties. Section 1099 contains one exception, the "express authorization" exception. This exception applies where the relevant legislature, which in the present case would be the Fresno City Council, by legislation has expressly excused the incompatibility of two offices.

If it is determined that the offices are incompatible, then the City Manager will be deemed to have resigned from his position as City Manager. A subsequent determination that the offices are incompatible will not invalidate the votes made by the City Manager while a member of the Employees Retirement Board.

CONCLUSIONS

It is the conclusion of this office that it is uncertain whether the "express authorization" exception in Government Code section 1099 (a) applies to the current situation and that it is appropriate for the Retirement Board to take prudent steps to validate the position of the City Manager on the Employees Retirement Board. Seeking further clarification is particularly important because it is the further conclusion of this office that, in the absence of the "express authorization" exception, the offices of City Manager and Board member of the Employees Retirement Board are incompatible. It should be

noted that the City Attorney has concluded that the "express authorization" exception does apply to the present situation.

RECOMMENDATIONS

Given the importance of this issue, this office recommends that the Boards request that the legal opinion issued by the City Attorney on this topic be provided to the Boards for their review, with the Boards then in a position to follow and adopt this office's opinion or the opinion of the City Attorney.

This office recommends that the Boards validate the City Manager's position on the Board. One validation option is for the Employees Retirement Board to request the City Council to amend Municipal Code section 3-505 (a)(1) to expressly provide that the City Manager may sit on the Employees Retirement Board. The City Attorney has, however, notified this office that it does not consider such an amendment to be necessary.

Alternatively, it would be prudent to validate the City Manager's position on the Employees Retirement Board by having a request made to the California Attorney General for an opinion on this topic. The Retirement Board cannot itself apply for an opinion. A state legislator may request an opinion. This office recommends that the Boards consider coordinating with the Mayor's Office, the City Council, and City Attorney to ask a local state legislator to request such an opinion from the Attorney General. A final alternative open to a "private party" under Civil Code section 803, is to request leave from the Attorney General to file a quo warranto action in superior court to determine if the City Manager may lawfully serve in both offices.

FACTUAL BACKGROUND

On July 21, 2011, the Mayor appointed the City Manager to be a management appointee on the Employees Retirement Board and the Fresno City Council confirmed the Mayor's appointment.

GOVERNMENT CODE SECTION 1099

The question before the Boards involves the doctrine of incompatible public offices. That doctrine formerly was a common law doctrine primarily elaborated in a long line of opinions issued by the California Attorney General. The legislature in 2005 codified the common law doctrine in California Government Code section 1099 which provides as follows:

(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:

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

(b) When two public offices are incompatible, a public officer shall be deemed to have forfeited the first office upon acceding to the second. This provision is enforceable pursuant to section 803 of the Code of Civil Procedure.

(c) This section does not apply to a position of employment, including a civil service position.

(d) This section shall not apply to a governmental body that has only advisory powers.

(e) For purposes of paragraph (1) of, subdivision (a), a member of a multimember body holds an office that may audit, overrule, remove members of, dismiss employees of, or exercise supervisory powers over another office when the body has any of these powers over the other office or over a multimember body that includes that other office.

(f) This section codifies the common law rule prohibiting an individual from holding incompatible public offices.

Government Code section 1099 contains a number of provisions which may be summarized as follows:

1. Only public officers are impacted by section 1099.
2. Members of boards may be public officers.
3. Public officers may not serve at the same time in two offices that are incompatible.
4. Such incompatibility may be overcome by an express legal authorization.
5. Incompatibility exists where, among other things, one office may dismiss employees of the other body.
6. Incompatibility exists where there is a possibility of a significant clash of duties or loyalties between the two offices.
7. Incompatibility exists where "public policy considerations" make it improper for one person to hold both offices.
8. When there is incompatibility, the individual is deemed to have forfeited the first office.
9. Section 1099 does not apply to employment.
10. Section 1099 does not apply to advisory bodies.
11. Section 1099 codifies the common law doctrine of incompatible offices.

The California Attorney General has also opined that section 1099 codifies the common law doctrine and that prior interpretations of the common law doctrine by its office or by the courts continue to be viable as interpretations of section 1099.

POSITION OF THE CITY ATTORNEY'S OFFICE

We have been advised that the Office of the City Attorney has opined that the doctrine of incompatible offices does not preclude the City Manager from simultaneously sitting on the Employees Retirement Board. The basis for the City Attorney's opinion is that the exception in Government Code section 1099(a) applies to the present situation. We analyze this issue on pages 4-5 of this memorandum. Although we have not been provided a complete copy of the City Attorney's opinion, this office recognizes that opinions of a City Attorney upon municipal matters are accorded great weight by courts in a manner similar of opinions of the Attorney General.

ANALYSIS

Before analyzing the doctrine of incompatible offices, it is useful to set forth in general duties the duties of the City Manager and the duties of a retirement board member.

DUTIES OF THE CITY MANAGER

Under sections 705, 804, and 1202 of the charter of the City of Fresno, the City Manager possesses the following significant powers:

1. Serves as head of the administrative branch of City government and, as such, exercises control over all departments, offices and agencies under his or her jurisdiction.
2. Appoints, suspends, and removes department heads and deputies and approves or disapproves all proposed appointments and removals of subordinate employees.
3. Confers with the Mayor as to the annual budget; prepare the budget; administer the budget.
4. Makes recommendations to the Mayor concerning the administration of city affairs.
5. Appoints the Controller.
6. Per the City Attorney's October 31, 2011 email, acts as chief labor negotiator.

DUTIES OF A MEMBER OF THE EMPLOYEES RETIREMENT BOARD

A member of the Employees Retirement Board has a well-recognized set of duties:

1. Sets actuarial assumptions.
2. Sets the City's contribution rate.
3. Determines investment issues, including determining the system's asset allocation and selecting investment managers.
4. Interprets the retirement provisions of the Municipal Code.
5. Decides whether to grant disability retirement applications.

6. Selects Board vendors, e.g., legal counsel, actuary, investment consultant, auditor, pension administration software.

APPLICATION OF THE EXCEPTION IN GOVERNMENT CODE SECTION 1099 (a) TO THE PRESENT SITUATION

It is the position of the City Attorney that the "express authorization" exception in Government Code section 1099 applies to the present situation. If the City Attorney is correct, then that resolves the issue. This office respectfully submits, however, that the issue of the application of the "express authorization" exception to the present situation is uncertain. Given the importance of this issue, we will discuss it in this memorandum first and then discuss the application of section 1099 itself (without reference to the "express authorization" exception).

The "express authorization" exception in Government Code section 1099 (a) provides that an individual may serve in incompatible offices "when ... simultaneous holding of the particular offices is ... expressly authorized by law". This office has not discovered any legislative history or Attorney General opinion or court case which defines the term "expressly authorized" or otherwise elaborates on this exception. Black's Law Dictionary, a source to which courts refer, defines "express" to mean "clear, definite, explicit, unmistakable, not dubious or ambiguous".

The Attorney General in a variety of opinions has applied the "express authorization" exception in situations where a particular position was specifically mentioned in the enabling legislation. The Attorney General has also ruled that the city councils of charter cities may by "appropriate legislation" permit the holding of incompatible offices. E.g., 73 Ops. A.G. 357, 360 (1990); 66 Ops. A.G. 292, 296-297 (1983). "Appropriate legislation" includes an ordinance but does not include a change in a job description approved by a city council. 82 Ops. A.G. 201, 205 n1. Prior to the enactment of section 1099 in 2005, the court in *American Canyon Fire Protection District v. County of Napa*, 141 Cal. App. 3d 100, 104 (1983) expanded this exception to include implicit, rather than express, authorization where the entire statutory scheme indicated an intent by the legislature to permit the same individual to serve in incompatible offices.

The question before this office narrows itself to a question of whether the City of Fresno expressly authorized the City Manager to serve on the Employees Retirement Board. The charter of the City of Fresno at section 910 provides that the Employees Retirement Board shall consist of five members, with "two members from management appointed by the Mayor with the approval of the City Council". The Fresno Municipal Code at section 3-505 (a)(1) modifies this charter language slightly by changing "management" to "city management employees". In neither section is the City Manager expressly authorized to sit on the Employees Retirement Board. Nor are we aware of any legislative or ballot history of these sections that would be relevant to the present issue.

It seems clear that the position of City Manager is a management position and therefore comes within charter section 910. It also seems clear that the City Manager is a management employee for purposes of Fresno Municipal Code section 3-505 (a)(1). It, however, also seems clear that the term "management" encompasses a sizable group of City positions. It is difficult to see how a reference to a sizable discrete class, i.e., the class of management employees, constitutes "express authorization" of any particular position in that class. On the contrary such a vague reference is not clear, definite, or explicit; it is instead ambiguous. That is particularly the case where almost every member of the class of City management, except for such exceptions as the City Manager or Fire Chief or Police Chief, is an employee, not an officer, and so not subject to section 1099 even without recourse to the "express authorization" exception.

If this office were to make a determination, we would conclude that neither charter section 910 nor Fresno Municipal Code section 3-505 (a)(1) constitute express authorization. But this office recognizes that there is little authoritative guidance on this issue.

We recognize that the City Attorney has come to the opposite interpretation. The City Attorney in support of its position has referred us to an opinion of the Attorney General, 81 Ops. A.G. 344 (1998). In that opinion, the Attorney General ruled that the membership of the Hesperia City Council may permissibly serve as the boards of the Hesperia Fire Protection District and the Hesperia County Water District. The basis for the Attorney General's ruling in that opinion was that the applicable legislation, i.e., the Cortese-Knox Local Government Reorganization Act at Government Code section 56037, specifically provided that a city council could serve as the ex office board of directors of a district. That opinion did not include any general discussion of the term "express authorization" as used in Government Code section 1099. So the opinion would at the most serve as an analogy to the current situation. But, in the opinion of this office, it would be a weak analogy because the legislative reference to the city council in that opinion is far more express than the reference in the Fresno Municipal Code to the City Manger as a "management employee" in the situation before us.

Given the desirability of validating the position of the City Manager on the Board, this office is persuaded and therefore recommends that an opinion from the Attorney General should be sought. If that is not possible, then seeking leave from the Attorney General to file a quo warranto action should be considered.

**APPLICATION OF GOVERNMENT CODE SECTION 1099 TO THE CITY
MANAGER SITTING AS A MEMBER OF THE EMPLOYEES RETIREMENT BOARD**

This office has concluded that it is uncertain whether the "express authorization" exception in Government Code section 1099 applies to the present situation and that further clarification should be sought.

Seeking further clarification is particularly important because it is the further opinion of this office that, in the absence of the "express authorization" exception, the offices of City Manager and Board member of the Employees Retirement Board are incompatible.

In support of this office's analysis and conclusion is a 1997 opinion of the Attorney General concluding that the City Manager of South San Francisco could not serve as a trustee on the school board of the South San Francisco Unified School District. 80 Ops. A.G. 74 (1997). In that opinion the Attorney General first ruled that the City Manager was a public officer for purposes of the doctrine of incompatible offices. The opinion then went on to affirm that only a single potential clash of loyalties was necessary. The opinion contained a review of the web of relationships between a city and a school district within the geographical boundaries of the city, giving rise to the conclusion that a significant clash of loyalties existed. The same analysis applies in the present context. As described below, there is a multitude of relationships between the City and the Retirement Boards that results in a conclusion that a significant clash of loyalties results from the City Manager sitting on the Employees Retirement Board.

1. City Manager of the City of Fresno as a Public Officer for Purposes of Government Code Section 1099

The Attorney General has recognized that "the position of...a city manager may not be so easily categorized for purposes of the incompatible offices rule". 90 Ops. A.G. 24, 27 (2007). Notwithstanding

this awareness, the Attorney General in a number of opinions has ruled that a city manager of a general law city was a public officer. See 81 Ops. A.G. 304 (1998); 80 Ops. A.G. 74, 76 (1997); 51 Ops. A.G. 183 (1968); 22 Ops. A. G. 83 (1953).

We note that the City of Fresno has adopted a strong mayor form of government. So, for example, under section 400 of the charter, it is the mayor who bears the obligation to enforce all ordinances and policies of the City, possesses budgetary authority, and controls the City Manager. The City Manager, nonetheless, under section 705 of the charter, possesses significant authority. The duties of the city manager of Laguna Beach that the Attorney General in 51 Ops. A.G. 183 (1968) concluded were those of an officer for purposes of the doctrine of incompatible offices are substantially similar to the powers and duties of the Fresno city manager as outlined in charter section 705. Even under a strong mayor form of government, the Fresno city manager does not resemble a deputy city manager, a position which the Attorney General has ruled is not a public officer for purposes of Government Code section 1099. Accordingly, this office concludes that the Fresno city manager is a public officer for purposes of Government Code section 1099.

2. Member of the Employees Retirement Board as a Public Officer for Purposes of Government Code section 1099

Given the authority of the Employees Retirement Board under charter section 910 and under the Fresno Municipal Code, this office concludes that the a retirement board member is a public officer for purposes of Government Code section 1099. See 89 Ops. A. G. 158 (2000).

3. There is a Significant Clash of Loyalties Between the Position of City Manager and the Position of a Board Member of the Employees Retirement Board

As background, opinions of the Attorney General and the text of Government Code section 1099 clarify that (a) any clash of loyalties must be significant, (b) there needs to be one clash of loyalties that is significant, and (c) the significant clash of loyalties need only be a possible or potential clash, rather than an actual clash. This office concludes that having the City Manager sit as a member of the Employees Retirement Board does raise the possibility of a significant clash of loyalties.

a. Setting actuarial assumptions and city contribution rates

The Retirement Board sets actuarial assumptions and actuarial funding policies that determine the City's contribution rate. This is a significant issue that has significant consequences for the City and its budgeting process. The Attorney General in several opinions has addressed contribution questions in the context of water rates and has concluded that being on both sides of the contribution transaction created an incompatibility. As stated in 80 Ops. A.G. 242, 245 (1997):

Here it is apparent the defendant in one capacity is responsible for the fixing of water rates and in another capacity for the payment of the City's obligations, including water charges imposed by the District.

...

If such a request [for a lower water rate] is made of the District, will the defendant disregard any concern he may have respecting the fiscal integrity of the City and vote objectively as a District Director to deny the request or will he disregard any such concern for the best interests of the District and vote objectively to grant the City's request?

...

If an action is brought against him as the City Treasurer by the District for the collection and enforcement of disputed charges, shall he act as both the plaintiff and the defendant?

A similar clash of loyalties is present in the current situation. The City Manager under the charter is obligated to administer the budget. In terms of the City's budgetary interest, having the Retirement Board set a lower city contribution rate is in the City's interest. In terms of the financial stability of the retirement system, such a contribution rate may not be in the best interests of members and retirees of the system. The clash is significant.

b. Determining the City's Budget

The City Manager works with the Mayor to prepare a budget. The City Manager presents the budget to the Council. The City Manager administers the budget. The City Manager with respect to the current City budget proposed to include an item in the budget transferring a million dollars from the retirement systems to the general fund to balance the budget. This proposal raises significant legal concerns and was taken without coordination with or notice to the Retirement Boards. If and when this item reaches the Retirement Boards, the City Manager would be on both sides of this issue. The City's budgetary process occurs annually. The potential for a significant clash of loyalties exists in this situation.

c. Labor Relations Clashes

The potential for a clash of loyalties is illustrated by the long-running events concerning the City of San Diego retirement system, resulting in state and federal criminal indictments of several management employees sitting Retirement Board members. The crux of the San Diego problem was that City administration, with the active involvement of the City Manager in developing proposals now known as Manager Proposals 1 and 2, and the employee organizations agreed to increase retirement benefits, provided that the Retirement Board agreed to postpone a scheduled increase in city contributions. The Retirement Board did so, and a lengthy train of significant and negative events followed. *Lexin v. Superior Court*, 47 Cal. 4th 1050 (2010). The possibility of such a clash is maximized whereas here the City Manager is the chief labor negotiator and also sits on the Employees Retirement Board.

d. Retirement Board Staffing Issues

The Retirement Board may wish in the future to add additional staff positions. The City Manager is ultimately responsible for inclusion of such requests in the Mayor's Annual City Budget. The City often experiences employment freezes. The City Manager could experience a clash of loyalties between administering a hiring freeze and considering the needs of the Board and system.

e. Contracts with the City

The City has had a contract for many years with the Boards concerning the provision of services to the City's deferred compensation plan. The City Manager would be on both sides of this contract.

f. Payment to the City for City Services

The Retirement Boards pay the City significant sums annually for certain on-going services, such as IT services. The Boards must decide on the reasonableness of the charges submitted to it. The City Manager would be on both sides of this review.

g. Board Travel Policy

Members of the Retirement Board must attend appropriate educational conferences to satisfy their fiduciary obligation to remain informed and educated about retirement system matters. The City on occasion restricts travel by employees for budgetary reasons. The City Manager would be on both sides of this issue.

h. Supervision Over Employee Members of the Employee Retirement Board

The City Manager possesses ultimate supervisory authority over the employee members of the Employees Retirement Board. The City Manager may possibly have a clash of loyalties between being one Board member equal to the other Board members while at the same time being their employer.

As this list indicates, this office is of the opinion that there exists a significant potential clash of loyalty between the office of City Manager and the office of a member of the Employees Retirement Board.

REQUESTING AN OPINION FROM THE ATTORNEY GENERAL

The California constitution and Government Code section 12519 specify the officials who may request opinions from the Attorney General. Retirement boards are not included in the list. City attorneys are included but only with respect to criminal matters. State legislators are among those eligible to request an opinion. This office recommends that the Retirement Boards coordinate with City officials to advance such a request to a local state legislator.

CONSEQUENCES OF HOLDING INCOMPATIBLE OFFICES

The Attorney General in section F of article XII of its Conflicts of Interest publication has set forth the consequences of holding incompatible offices:

Where a public official holds incompatible offices, section 1099 provides for an automatic vacating of the first office....The appropriate mechanism for enforcing the vacating of the office is a suit in quo warranto under Code of Civil Procedure section 803....Disqualification or abstention from those decisions where an actual clash of the two offices occurs is not an available remedy under section 1099 or common law.

As applied to the current situation, if the City Manager is holding incompatible offices, he would be deemed to have automatically vacated the office of City Manager and would remain a member of the Employees Retirement Board. However, if we follow the law and the City Manager is no longer an employee then he is no longer eligible to serve as a Board Member under the requirements of the Fresno Municipal Code.

STATUS OF VOTES TAKEN PRIOR TO A DETERMINATION THAT THE OFFICES ARE INCOMPATIBLE

It is important to note that, even if it were to be determined that the City Manager were holding incompatible offices, the votes taken as a member of the Retirement Board would not be invalidated. His actions as a City Manager would similarly not be effected prior to the determination of the incompatibility. As the Attorney General in section F of article XII of its Conflict of Interest publication has stated:

...notwithstanding the legal forfeiture, the person remains in the first position as a de facto member until he or she actually resigns or is removed from office by a quo warranto action or other lawsuit.

74 Ops. A.G. 116, 121 (1991). Since the office that the City Manager would be vacating under this doctrine is that of City Manager, his votes as a member of the Retirement Board would not be effected by a determination of incompatibility.

SEEKING LEAVE TO FILE A QUO WARRANTO ACTION

One option available to validate an individual's right to hold a public office is a quo warranto action under Code of Civil Procedure section 803. Section 803 permits "a private party" to bring such an action. The Attorney General in section F of article IX of its Conflicts of Interest publication has addressed this option:

A quo warranto proceeding is a civil action by which title to any public office may be determined....Where such a proceeding is brought on the relation of a private individual (relator),...[t]he actions of the relator are under the supervision and complete of the Attorney General.

The Attorney General requires submission of an application for leave to sue on behalf of the People....In deciding whether to issue leave to sue by a relator, the basic question is whether a public purpose would be served....This office must determine whether a substantial issue of fact or law exists which should be judicially determined.

E.g., 81 Ops. A.G. 304 (1998) (relator being the Alameda County Central Labor Council); 22 Ops A.G. 83 (1953). See 11 Cal. Code Regs. sections 1-10. If the Retirement Board is interested in considering this option, this office will present a written analysis on this option, including whether the Board is a "private party" as required under Code of Civil Procedure section 803.

CONCLUSION

It is the conclusion of this office that it is uncertain whether the "express authorization" exception in Government Code section 1099 (a) applies to the current situation and that it is appropriate for the Retirement Board to take prudent steps to validate the position of the City Manager on the Employees Retirement Board. Seeking further clarification is particularly important because it is the further conclusion of this office that, in the absence of the "express authorization" exception, the offices of City Manager and Board member of the Employees Retirement Board are incompatible. It should be noted that the City Attorney has concluded that the "express authorization" exception does apply to the present situation.

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JULIE JELLEN, PARALEGAL
VANESSA de FABREGA, PARALEGAL
QUI LU, PARALEGAL
ELISE THURMAN, PARALEGAL
BARBARA SOUZA, PARALEGAL

MEMORANDUM

TO: City of Fresno Retirement Boards
FROM: Russ Richeda, Legal Counsel
Stanley McDivitt, Retirement Administrator
DATE: February 3, 2012
RE: Status of the City Manager as a Member of the Employees Retirement Board Under the Incompatible Offices Doctrine

BACKGROUND

The Retirement Boards directed this office to consider the issue of whether having the City Manager sit on the Employees Retirement Board raised any legal difficulties under the doctrine of incompatible offices. In a memorandum to the Boards dated December 6, 2011, this office concluded that having the City Manager sit on the Employees Retirement Board raised serious concerns under the doctrine of incompatible offices. The Boards thereafter directed this office to request that the City Attorney ask the City Council to release the opinion that office had submitted to the Council on this issue. The purpose of the request was to permit the Boards to review all of the relevant legal analysis that had been prepared on this issue and to determine what further steps, if any, were appropriate in light of that review.

ATTACHMENTS

Attached to this memorandum for Board consideration are (1) this office's original memorandum, (2) this office's December 18, 2011 letter to the City Attorney, (3) the February 2, 2012 memorandum from the City Attorney to the Council concerning the Boards' waiver request, and (4) the City Attorney's July 19, 2011 email to the Mayor and Council concerning the appointment of the City Manager to the Employees Retirement Board.

COMMENTS ON THE CITY ATTORNEY'S JULY 19, 2011 EMAIL TO THE MAYOR AND COUNCIL

This office would remind the Boards that opinions of a city attorney are entitled to deference. Thus the City Attorney's July 19, 2011 email to the Mayor and Council is entitled to deference.

This office has reviewed the City Attorney's July 19, 2011 email and, notwithstanding the deference due it, respectfully disagrees with it for the reasons advanced in this office's December 6, 2011 memorandum. Both this office and the City Attorney agrees, that in the absence of express authorization, having the City Manager sit on the Employees Retirement Board would raise serious

issues under the doctrine of incompatible offices. This office and the City Attorney disagree on the issue of express authorization. The City Attorney considers the references in Charter section 910 and Fresno Municipal Code section 3-505(a)(1) to constitute express authorization. For the reasons set forth on pages 5-6 of our December 6, 2011 memorandum, we disagree with this interpretation. In the opinion of this office, the charter and Municipal Code references to “management” or “city management employees” is insufficiently specific to constitute express authorization¹.

OPTIONS BEFORE THE BOARDS

The initial step for both Boards is to review the material attached to this memorandum. After their review the Boards should then discuss and adopt one of the following options”

1. Accept the City Attorney’s opinion and reject this office’s opinion.
2. Accept this office’s opinion and consider the following options.
3. Direct this office to prepare for Board review a proposed ordinance expressly authorizing the City Manager to sit on the Employees Retirement Board.
4. Request that the City Manager resign from the Board.
5. Initiate the process to have an opinion sought from the Attorney General.
6. Have this office research whether the Boards may file a quo warranto action in Superior Court.

This office looks forward to discussing these options with the Boards.

¹ The City Attorney in his July 19, 2011 email did not cite to any authorities on this issue not previously analyzed by this office in its December 2011 memorandum to the Boards.

CITY OF FRESNO

150135

ASSISTANT CITY MANAGER

DEFINITION

Under administrative direction, directs the operations of City departments as assigned. Directs and coordinates special projects and programs.

SUPERVISION RECEIVED/EXERCISED

Receives supervision from the City Manager. Exercises supervision over a group of City departments.

DISTINGUISHING CHARACTERISTICS

The Assistant City Manager exercises delegated supervision over a group of City departments, relieves the City Manager of a wide variety of administrative duties, and facilitates managerial communication with and among City departments. The incumbent reports to and receives direction from the City Manager on matters of policy and new assignments consisting only of desired objectives and exercises considerable independent judgment in overseeing assigned departments. This is an unclassified position in which the incumbent serves at the will of the City Manager.

EXAMPLES OF IMPORTANT AND ESSENTIAL DUTIES

(May include, but are not limited to, the following:)

Directs the activities of City departments as assigned, and oversees the operations thereof.

Performs all duties and assumes all responsibilities of the City Manager when appointed by the City Council as the Acting City Manager to serve during the City Manager's absence from the City, his or her inability to perform duties, or during any vacancy in the position.

Confers with department heads to convey information concerning established policies and practices and to solicit information needed as a basis for action.

Confers with the City Manager on matters concerning major departmental activities and community problems and recommends course of action.

Directs the preparation of reports, agreements, contracts, resolutions, and ordinances, and attends City Council meetings.

Monitors implementation of agreements; devises solutions to problems; if necessary, assigns to appropriate City staff for further research and action.

May attend committee meetings, civic gatherings or other official functions.

Directs and coordinates special projects and programs.

Participates in the preparation of the annual City budget and the administration thereof.

Performs related duties as required.

JOB RELATED AND ESSENTIAL QUALIFICATIONS

Knowledge of:

The functions, principles, practices and techniques of public administration and management.

The principles and priorities of all levels of government as applied to the development and implementation of services essential to the community.

The principles and practices of effective employee supervision, including selection, training, work evaluation and discipline.

Principles and practices of municipal budget preparation and administration.

City, state and federal regulations governing the affairs of the City including the sources of revenue.

The methods and techniques involved in conducting analytical studies of administrative and management practices and procedures.

The general relationships between local, state, and federal governments, public interest groups, and private enterprise as they affect the City.

Skills to:

Operate modern office equipment including computer equipment.

Ability to:

Research and analyze a variety of administrative, management, budgetary and fiscal practices, procedures and problems and to make sound policy and procedural recommendations and decisions as to their solution.

Prepare and administer budgets.

Participate in labor negotiations and handle labor relations problems.

Prepare clear, concise and comprehensive records, reports, correspondence and other written materials.

Make clear and persuasive oral presentations.

Maintain effective working relations with City employees, officials of other government agencies, and community and business leaders.

MINIMUM QUALIFICATIONS

Experience:

Four years of administrative experience in the planning, coordination and financing of varied activities, preferably in a municipality, at progressively responsible levels.

Education:

Graduation from an accredited college or university with a Bachelor's Degree, with major course work in business administration, public administration, or related field. Additional experience at an appropriate high level of management may be approved by the City Manager and Personnel Services Director on an equivalency scale as follows: two years experience for each year of required education.

Special Requirements:

Possession at time of appointment and continued maintenance of a valid California Driver License may be required.

Excerpt from City Manager web page,

<http://www.fresno.gov/Government/CityManager/default.htm>



Renena Smith
Assistant Manager

As Assistant City Manager (ACM) R. Renena Smith demonstrates a passion for public service. She is committed to creating a culture that inspires highly experienced and skilled employees to be innovative and resourceful in providing excellent service to our community.

As ACM she effectively communicates with all levels of the organization and the community on a fair and equitable basis. She takes great pride in promoting collaboration between City departments as well as with other organizations and community partners.

Renena's 25 year public service career has been multifaceted in that its focus spans a wide range of duties including: financial management, budgeting, personnel, labor negotiations, policy development, strategic planning, leadership, team building and management. She has been with the City of Fresno in excess of 17 years, serving over 8 years as the City's Budget Director, with the most recent 3 years as the ACM. Prior to joining the Fresno team she was employed by the County of Fresno where she gained experience as a municipal auditor, was responsible for the preparation of the Financial Statements for the Fresno County Transportation Authority and coordinated the SB90 State Mandate program across all departments. Additionally, her duties included property tax allocation and reconciliations. Renena came to the County with experience in private sector accounting that she gained at Baker, Peterson & Franklin, CPA's.

Departments currently reporting directly to Renena include: Finance, Personnel, Information Services, Budget, Housing and the Fresno Yosemite International Airport.

Renena is also involved in strategic planning for the Public Works, Public Utilities, Planning & Development and Fire Departments. She serves on several internal task force committees as well as being a Workforce Investment Board member. She previously served two years on the Convention and Visitor's Bureau board.

Renena was raised in Fresno and attended California State University Fresno where she earned a Bachelor of Science degree in Accounting with an emphasis in management. In the spring of 2013 Ramona Renena Smith received a Master of Public Administration degree from the University of Southern California.

Renena and Jeff have been married 26 years. They have a 23 year old son, Jeffery, who will obtain his Bachelor of Arts in Journalism from CSU Fresno in December 2014.



City of Fresno

2600 Fresno Street
Fresno, CA 93721
www.fresno.gov

Legislation Details (With Text)

File #: ID#15-117 **Version:** 1 **Name:**
Type: Appointment **Status:** Agenda Ready
File created: 2/4/2015 **In control:** City Council
On agenda: 2/26/2015 **Final action:**
Title: Approve the appointments of R. Renena Smith to the City of Fresno Employees Retirement Board and Barry Falke to the Housing and Community Development Commission
Sponsors: Mayor's Office
Indexes:
Code sections:
Attachments: 1. Appt - Employees Retirement Board.pdf, 2. Appt. HCDC.pdf

Date	Ver.	Action By	Action	Result
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APPOINTMENT

February 26, 2015

SUBJECT

Approve the appointments of R. Renena Smith to the City of Fresno Employees Retirement Board and Barry Falke to the Housing and Community Development Commission

RECEIVED

2015 FEB 4 PM 3 30

CITY CLERK, FRESNO CA



MAYOR ASHLEY SWEARENGIN

**NOTIFICATION OF APPOINTMENT BY MAYOR
TO BOARD OR COMMISSION**

TO: City Council
THROUGH: Yvonne Spence, City Clerk
BY: Ashley Swearengin, Mayor

Reappointment
 New Appointment
Name of person replaced: Jeff Beatty

Name: Renena Smith
Address: 2600 Fresno Street
Fresno, California 93721

Business Phone: (559) 621-8000

Appointed to: City of Fresno Employees Retirement Board

Term: Continuous

City Council Agenda 02/26/15

CITY OF FRESNO