MEMORANDUM OF LAW

DATE: April 30, 1986

TO: Rich Snapper, Personnel Director
FROM: City Attorney
SUBJECT: Legal Representation Before the Civil Service Commission Provided by the Office of the City Attorney

By a memorandum dated April 17, 1986, you requested that this office advise you concerning the contents of a letter from Patrick Thistle, attorney at law, to the President of the Civil Service Commission, challenging the City Attorney's office representation of the Civil Service Commission during disciplinary proceedings. Mr. Thistle's letter, which you attached to your memorandum, indicated that he believed that when the office of the City Attorney approves the discipline and prosecutes the case on behalf of the appointing authority and also advises the Civil Service Commission on legal matters before, during and after the appeal hearing, that such a combination of activities by the City Attorney constitutes a conflict which violates existing legal standards. Enclosed with his letter was a copy of Civil Service Com. v. Superior Court, 163 Cal.App.3d 70, 209 Cal.Rptr. 159 (1984) and Formal Opinion No. 1984-82, State Bar of California, Committee on Professional Responsibility and Conduct.

It is the policy of the City Attorney's office to provide legal counsel to both the Civil Service Commission and to appointing authorities during disciplinary appeals. The appointing authority's case is presented by a deputy city attorney who has been assigned to give legal advice to that department. This office also provides legal counsel to the Commission by either a chief deputy city attorney or a deputy city attorney from the Legislative and Public Affairs Division of the office. It is the policy of the City Attorney's office that an attorney who has previously advised the appointing authority in the same matter pending before the Commission will not advise the Commission. Mr. Thistle's position appears to be that these policies violate "existing legal standards."

The case which Mr. Thistle cited in his letter held that the County Counsel of the County of San Diego was precluded from representing the County of San Diego in a lawsuit where the same Deputy County Counsel had advised the Civil Service Commission in respect to a given matter and then later represented the County

in a lawsuit against the Civil Service Commission arising out of the same matter. The facts of the case briefly stated are as follows.

County Counsel Lloyd Harmon and Deputy County Counsel Ralph Shadwell had consultations with the County Civil Service Commission concerning complaints of two County employees. At that time, Shadwell was representing the Department of Social Services, whose actions the Commission was investigating as a result of these complaints. The advice concerned the reinstatement and demotion of certain individuals who had been demoted or laid off and had been ordered to be paid backpay by the Commission. The County of San Diego disagreed with the ruling of the Civil Service Commission and filed suit in superior court pursuant to Code of Civ. Proc. Secs. 1085 and 1094.5. The Civil Service commission was granted independent counsel by the County during the pendency of the lawsuit. The Commission then went to court and attempted to have the County Counsel relieved from representing the County. The issue was: "Could a public attorney who has advised a quasi-independent public agency with respect to a given matter, consistent with his professional and legal obligations, later represent other governmental entities suing that same quasi-independent agency over the same matter?" The court determined that the County Counsel's office must be disqualified in this case because a fundamental conflict would always exist whenever the County Counsel's office is asked to represent both the Commission and the County against each other in the same lawsuit. The court noted that the County Counsel is appointed by the Board of Supervisors, and its primary responsibility is to the Board of Supervisors. The court went on to state, however, that where the Commission has been afforded access to independent legal advice, there is no reason why County Counsel may not continue to vigorously represent the County even when such representation results in litigation against the Commission. The court specifically made no comment on whether or not the Commission could, if it was appropriately informed, waive any conflict in the advisory stage. The decision was limited by the court's own cautionary comments indicating that they did not mean to suggest that government attorneys must necessarily be treated identically to attorneys in private practice because the rules of professional conduct are drafted almost exclusively from the perspective of the private practitioner and are not sensitive to conflict of interest questions as they affect governmental attorneys.

The facts described above portray a different situation from the one described by Mr. Thistle in his letter even though he

cites this case for the legal authority behind his position. In fact, the court in the Civil Service Commission of San Diego County v. Superior Court specifically distinguished the facts before it from the situation described in Mr. Thistle's letter when it referred to County Policy Statement No. 9 which states:

> It is an official policy of the Commission that a County Counsel attorney may represent the hearing officer in a given hearing and another County Counsel attorney may represent the appointing authority. Such a policy is deemed legal and appropriate. However, if a hearing officer determines that any given representation constitutes a potential conflict of interest, the matter will be resolved at or prior to the hearing, or he or she will return to the full Commission for action.

This is a clear indication that this case does not stand for the authority that the City Attorney's office of San Diego cannot provide counsel for both the appointing authority and the Civil Service Commission during disciplinary appeals. It only applies to the conflict of interest which arises when the Commission is sued by the City and both sides are represented by the City Attorney's office. This has not occurred in recent history but that factual situation would clearly violate Rule 4-101 of the Rules of Professional Conduct of the State Bar of California which states:

> A member of the State bar shall not accept employment adverse to a client or former client, without the informed and written consent of the client or former client, relating to a matter in reference to which he has obtained confidential information by reason of or in the course of his employment by such client or former client.

The County's Policy Statement No. 9 correctly reflects the general law in this state which authorizes a government agency office to represent an appointing authority before a Civil Service Commission and also represent the Civil Service Commission as long as the same deputy does not represent both entities at the same time. As the court said in Ford v. Civil Service Commission, 161 Cal.App.2d 692, 327 P.2d 148 (1958),

> Appellant now insists that because the Civil Service Commission is advised by a member of the staff from the County Counsel's

> office, and the department is also represented by another member of the County Counsel staff, that such presents a "cozy situation" and is reversible error. Whether it was cozy or dismal or cheerless makes little difference if it was entirely fair and proper. Under our law, an administrative agency can even be both the prosecutor and the judge in the same matter. Citations omitted. There is no evidence that the deputy county counsel who advises the Commission did anything other than that which was wholly proper.

The same rules has been followed in other cases. In Midstate Theatres, Inc. v. County of Stanislaus, 55 Cal.App.3d 864, 128 Cal.Rptr. 54 (1976), the court held that Gov't Code Sec. 31000.7, which provides that an individual representative of the County Counsel's office may represent the Assessor and the County Board of Equalization as long as the same individual does not represent both parties, does not violate due process. The latest case in this regard is Rowen v. Worker's Comp. Appeals Bd., 119 Cal.App.3d 633, 641, 174 Cal.Rptr. 185 (1981) where the court stated:

> Quite clearly the WCAB may assign one or more of its staff to act as investigators and prosecutors in a particular contempt proceedings and still have other members of its staff act as advisory counsel in the WCAB internal adjudicatory process in that same matter. Citations omitted. While we have serious reservations about the WCAB in the same contempt proceedings, assigning a member of its staff or outside counsel to act as both prosecutor in a trial stage and advisory counsel to the WCAB in its decisionmaking process, we need not decide this issue. The record does not reveal that Mr. Rivkin in fact engaged in such dual capacity in the present proceeding.

The other authority cited by Mr. Thistle is also not on point. The State Bar of California Formal Opinion No. 1984-82 addresses ex parte communication between the hearing officer and either an attorney for the interested party (the appellant) or

the trial attorney for the agency (appointing authority). We agree that such ex parte communication between an advocate and a trier of fact has serious ethical consequences. However, this

does not appear to be the issue addressed by Mr. Thistle. He implies that this rule precludes the City Attorney who represents the Commission from engaging in ex parte communication with the Commission. However, we believe that this situation is covered by section A(4) of the American Bar Association's Code of Judicial Conduct which authorizes a judge to communicate with individuals whose responsibility is to aid that judge in carrying out his or her adjudicative duties. In addition, because the City Attorney advising the Civil Service Commission is not acting as an advocate but as staff counsel in an advisory role, the situation is more comparable to the duties of the advisory counsel in the Rowen v. Workers Comp Appeals Bd. case.

It appears clear, from the above analysis, that at the present time the law in California permits separate deputy city attorneys to represent both the Civil Service Commission and the appointing authority during disciplinary appeals. However, each deputy must independently represent each entity in a fair and proper manner consistent with the general rules of ethical and professional behavior.

JOHN W. WITT, City Attorney
By
John M. Kaheny
Deputy City Attorney

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