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"Providing Quality Legal Services to the County of Tuolumne"

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Superior Court of California
County of Tuolumne

By:  Clerk

Honorable Kate Powell-Segerstrom
Tuolumne County Superior Court
60 North Washington Street
Sonora, CA 95370

Re: Response to Grand Jury Report on Tuolumne County Fire and Dispatch (FY16/17)

Dear Judge Powell-Segerstrom:

I have reviewed the aforementioned Report. I wish to thank the members of the Grand Jury for their work on this Report as I am certain they spent a great deal of time reviewing the material, interviewing witnesses and drafting the Report. The Report specifically requests I respond to Recommendation 1. Below is my response.

Recommendations:

R1. Explain to the Grand Jury how having the same person fill the role of the Tuolumne County Fire Chief and the TCU's CAL FIRE Chief, while being paid by both the county and the state, is not a conflict of interest. This Recommendation is based on Finding 1, which states "having the same person fill the role of both the Tuolumne County Fire Chief and CAL FIRE Chief does not provide equal representation for either agency and may represent a conflict of interest." Additionally, on page 99 of the Report the Grand Jury cites to Government Code Section 1090, which is a statute that prohibits self-dealing in contracts.

Penal Code Section 933.05 sets forth the format for responding to the Grand Jury. However, the Grand Jury's request is for an explanation therefore this response may differ from the standard format for responses.

Response:

In order to thoroughly respond to this Recommendation, I would like to provide some education about the statutory authorization for CAL FIRE to enter into Cooperative

Agreements with local jurisdictions to provide fire protection services as well as to act as the County Fire Warden. I would also like to provide a summary of conflict of interest laws that apply to public employees and officials. I will also offer that as my Office is one of the legal advisors to the Grand Jury, we are always happy to answer these types of questions during the term of the Grand Jury rather than having the Grand Jury wait to obtain a response after a report has been issued.

1. CAL FIRE and Local Jurisdictions are Authorized to Enter Into Cooperative Agreements

Government Code Sections 55600 et seq. provides the statutory authority for the County and the California Department of Forestry and Fire Protection to enter into contracts for the purpose of prevention or suppression of fires within the county. The code also specifically allows for the Department of Forestry and Fire Protection to contract with a County to perform as the county fire warden. Additionally, the code provides that such a contract may provide for the duties, directions, and salaries of personnel as agreed upon. Further, Public Resources Code Sections 4141 et seq. provide additional statutory authority for the State Department of General Services to enter into cooperative agreements with other political subdivisions of the state, including counties, for the purpose of preventing and suppressing fires. Thus, there are two different statutory schemes authorizing the type of contract the County has with CAL FIRE.

Additionally, the County Cooperative Agreement is entered into with the State of California, Department of Forestry and Fire Protection and signed by the Chair of the Board of Supervisors and the Assistant Deputy Director of CAL FIRE. It is my understanding there is no impact on the Unit Chief's salary as a result of this type of Cooperative Agreement nor does he have the sole authority to enter into such an agreement. The County pays the State of California for the services provided but does not directly pay CAL FIRE employees. CAL FIRE employees receive compensation from the State of California, thus the statement in the Grand Jury report that the individual acting as the CAL FIRE Unit Chief and also as the County Fire Warden is being paid by both entities is incorrect.

2. Conflict of Interest Overview

The law recognizes several types of conflicts of interest principles such as the Political Reform Act, the prohibition against self-dealing in contracts, incompatible offices and common law conflicts of interest.¹ This discussion is intended to be at a very high level simply to set the framework for my response to the Recommendation.

The Political Reform Act is found in the Government Code. It prohibits public officials from participating in government decisions in which they have a financial interest and requires officials to disqualify themselves from making, participating or influencing the decision-making process in which they are financially interested. Government Code Section 1090 et seq. prohibits a public official or employee from being financially interested in a contract in both

¹ My Office provides a Public Officials Ethics Training each year. We invite members of the Grand Jury to attend for a much more detailed education related to this topic.

the official's public and private capacities. Government Code Section 1125 et seq. prohibits officers or employees from engaging in any employment or other activity that conflict with his/her public duties. Government Code Section 1099 et seq. prohibits individuals from holding incompatible public offices. And of course there is case law (referred to as common law because it originates from judicial decisions and not statutes) that requires a public officer to exercise the powers conferred upon him/her with disinterested skill, zeal, and diligence and primarily for the benefit of the public.

A. No Conflict Under Incompatible Offices Principles

In analyzing whether or not having the same person fill the role of both the Tuolumne County Fire Chief and the CAL FIRE Tuolumne-Calaveras Unit Chief is a conflict of interest, it is the above laws I reviewed. When a statute authorizes an individual to fill dual roles such as being a county fire warden and a CAL FIRE Unit Chief, Courts have found that the Legislature has abrogated what may have otherwise been considered an incompatible office.² Therefore, because the Government Code and Public Resources Code explicitly authorize this dual role there is no conflict of interest from an incompatible offices/activities theory. Thus, I disagree that a conflict of interest exists under this doctrine.

B. No Conflict Under the Political Reform Act

When it comes to the Political Reform Act, the Fair Political Practices Commission (FPPC) is the State Agency charged with administering the provisions of the Act. The FPPC is an enforcement body, but also issues advice related to conflicts of interest questions under the Political Reform Act and Government Code Section 1090. Only formal advice letters issued by the FPPC can provide a defense to prosecution for alleged violations of the Political Reform Act.

Under the Political Reform Act (PRA), there is no conflict of interest with the CAL FIRE Unit Chief acting as the County Fire Chief. The reason for this is because government salaries are not considered income under the PRA and state agencies are not considered business entities under the PRA. Therefore, no conflict exists and I disagree with the assertion that it may exist.

C. There Does Not Appear to be a Conflict Under Government Code §1090

The Grand Jury specifically referenced Government Code Section 1090, and indicated the individual that acts as both the Tuolumne County Fire Chief and the CAL FIRE Tuolumne-Calaveras Unit Chief may have a conflict of interest under this provision. Government Code Section 1090 prohibits self-dealing in contracts, and specifically prohibits one from being financially interested in a contract. Self-dealing is when one stands to gain a personal benefit. Some examples that illustrate an interest include, if a board member attempted to contract with the board to provide construction services to that governmental entity, Government Code Section 1090 would prohibit such a contract. If a staff member has an interest in a contract, the staff member is prohibited from participating in the making of the contract and must recuse him/herself so the agency may proceed with entering the contract.

² Am. Canyon Fire Prot. Dist. V. County of Napa (1983) 141 C.A. 3d 100.

Government Code Section 1090 applies differently to board members vs. employees. It completely prohibits the making of a contract if a board member is interested but allows a contract if an employee is interested as long as the employee is recused from all aspects of the contract process. Additionally, there are exceptions to the prohibition wherein some potential interests are so small that California law sees them as "non-interests" or "remote interests." If these exceptions apply, the agency may enter the contract.

In regards to the contract between CAL FIRE and the County, I have not found anything that supports the assertion a conflict of interest exists under Government Code Section 1090. The code does not define "financial interest" thus one must look to case law, Attorney General Opinions and FPCC Opinion Letters to interpret that term. These opinions focus on an individual's personal financial interest in contracts. Courts have found that an official has a financial interest in a contract if he/she might profit from it. When a contract does not confer any tangible benefit to the public employee there is no conflict of interest under Government Code Section 1090. The purpose of this law is to prevent a public official from standing to gain or lose something with regards to the making of the contract over which he/she has the ability to exercise influence in his/her official capacity. If there would be no change to the official's salary, benefits or status then there is no disqualifying conflict of interest. The Court in Eden Township Healthcare Dist. held that "if the contract itself offers no benefit to the official, either directly or indirectly, then the official is not financially interested in the contract and any explicit legislative exemption for such a circumstance would be unnecessarily redundant. In other words, there is no need to create an exception for a nonexistent financial interest..."³ It is my understanding there is no change to the CAL FIRE Unit Chief's salary, benefits or status as a consequence of the Cooperative Agreement. Therefore, he is not financially interested in the contract between CAL FIRE and the County and when there is not a financial interest, there is no conflict of interest.

Additionally, in analyzing conflicts of interest laws it is important to consider them in the context of the statutorily authorized service at issue, here the Cooperative Agreement between CAL FIRE and the County specifically allowed by the Public Resources Code and Government Code. It is a basic canon of statutory construction that statutes must be read together so that all parts of the statutory scheme are given effect. The Courts are charged with harmonizing statutes with other enactments to the extent possible so the various codes when read together are consistent.⁴ Another important principle of statutory construction is that the legislature is deemed to be aware of statutes and judicial decisions already in existence when it enacts or amends a statute.⁵ Therefore, because the legislature is deemed to be aware of the conflict of interest laws when it authorized the Cooperative Agreements per statute, it must be assumed they did not intend to apply Government Code Section 1090 to this particular situation. To do so would be inconsistent with the entire statutory scheme.

It is my opinion based on the foregoing that a conflict of interest does not exist. In regards to whether the dual role provides for equal representation for both the County and CAL FIRE, I do not have any information related to that issue and I am unable to provide an opinion.

³ Eden Township Healthcare Dist. v. Sutter Health (2011) 202 C.A. 4th 208, p. 228.

⁴ Lexin v. Superior Court (2010) 47 Cal. 4th 1050

⁵ People v. Yartz (2005) 37 Cal.4th 529.

Further, that issue is not a legal issue and should be answered by someone with knowledge about the interaction of the two entities.

I hope this explanation has or will prove helpful in understanding the complexities of conflict of interest laws.

Regards,

A handwritten signature in black ink that reads "Sarah Carrillo". The signature is written in a cursive style with a long horizontal stroke extending to the right from the end of the name.

SARAH CARRILLO
County Counsel