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LEGAL UPDATE

August 30, 2004

TO: Superintendents, Member School Districts (K-12)

FROM: Stephen L. Hartsell, Associate General Counsel

SUBJECT: Incompatible Activities
Memo No. 18-2004

INTRODUCTION

School board members and school district employees, like other public officers and employees in California, are subject to both statutory and common law prohibitions on conflicts of interest and incompatible activities. These are discussed both generally and in detail in Legal Update Memo No. 15-2002, Conflicts of Interest and Incompatible Activities.

This memorandum will focus on the prohibition found in Government Code Section 1125 *et seq.* against any officer or employee of a local agency from engaging in any employment or other activity for compensation which is in conflict with his or her public duties. Attachment 1 to this memorandum is a model policy or regulation which can be adopted to implement this statutory prohibition in your district. Attachment 2 is a “model” letter which can be used after governing board adoption of Attachment 1 to notify employees of their duties under the new policy or regulation.

BACKGROUND

Government Code Section 1126 provides that an officer or employee of a local agency shall not engage in any employment, activity or enterprise for compensation which is inconsistent, incompatible, in conflict with, or inimical to his or her official duties or the duties, functions or responsibilities of his or her appointing authority or employing agency. Section 1125 defines local agency to mean a "county, city, city and county, political subdivision, and municipal corporation." Since school districts are political subdivisions of the state, Section 1126 does apply to school district officers and employees.

However, subdivision (c) of Section 1126 also provides that "The local agency may adopt rules governing the application of this section. Such rules shall include provision for notice to employees of the determination of prohibited activities, of disciplinary activities, and for appeal by employees for such a determination and from its application to an employee." In *Mazzola v. City and County of San Francisco* (1980) 169 Cal.Rptr. 127, 112 Cal.App.3d 141, the court declared that this language means that:

Before a local agency applies this section in charging an employee with its violation, that agency must provide notice to the employee that a conflict of interest exists with respect to the employee's outside activities. Notice should also be provided to the employee with regard to the agency's intended disciplinary action, as well as provisions for appeal from the agency's determination.
(*Mazzola*, 169 Cal.Rptr. 127, at 134)

In a 1981 opinion (64 Ops.Cal.Atty.Gen. 795), the Attorney General stated that *Mazzola* means that Section 1126 was not "self-executing" as to employees and appointed officers.¹ Therefore, before a district attempts to discipline an employee for engaging in

¹ In a 1987 opinion (70 Ops.Cal.Atty.Gen. 157), the Attorney General noted that Education Code Section 35233 was amended to make school boards members expressly subject to the requirements of Section 1126. Although concluding that this meant that Section 1126(a) was "self-executing" with respect to school board members, the Attorney General also noted however that Section 1126:

provides no mechanism to force a school board member voluntarily to cure an existing, pervasive incompatibility or conflict. Absent voluntary action by a board member who is in violation of section 1126, the sanctions available would be removal from office pursuant to section 3060 *et seq.* of the Government Code, [FN7] or recall by the electorate.
(70 Ops.Cal.Atty.Gen. 157)

It must be noted that activities covered by Section 1126 may also be covered by other conflict of interest statutes and subject under those statutes to civil and criminal liability. See Legal Update No. 15-2002.

any employment or other activity for compensation which is in conflict with his or her public duties, it must comply with *Mazzola*.²

THE ATTACHMENTS

Attachment 1 can be adopted as either a board policy or district regulation depending on the practice of your district. Please note that some sections have two or more alternatives to select from and that other changes can be made to meet the individual needs or circumstances of your district. We recommend that employees be notified that the board has adopted a policy or regulation regarding incompatible activities and what their duties are under that policy or regulation. We have prepared Attachment 2 to assist you in this regard.

For represented employees, the district needs to be prepared at the very least to negotiate the disciplinary effects of adopting Attachment 1. We also recommend that any significant changes to either of the attachments be discussed with legal counsel before adoption or use.

SLH:bkd

Attachments: 1. *Model Policy/Regulation Re: Incompatible Activities*
2. *Model Notification Letter*

² As with board members, employees' activities covered by Section 1126 may also be covered by other conflict of interest statutes and subject under those statutes to civil and criminal liability. See Legal Update No. 15-2002.

ATTACHMENT 1

Model Policy/Regulation

INCOMPATIBLE ACTIVITIES

This [policy/regulation] is applicable to all officers and employees. It identifies activities which are inconsistent, incompatible, or conflicting with their duties or offices, imposes a duty on all officers and employees to disclose those activities, and specifies actions to be taken by supervisory/management personnel.

1.0 Regulations

A district officer or employee shall not engage in any activity or enterprise for compensation which is inconsistent with or inimical to either his/her own duties with the district or to the functions or responsibilities of the district.

This prohibition includes, but is not limited to, the following:

- 1.1 Use of district time, facilities, equipment, supplies, or name for private gain or advantage.
- 1.2 Receipt or acceptance of money or other consideration from other than the district for activity which the employee or officer is expected to render in the regular course or hours of his/her employment with the district.
- 1.3 Employment involving time demands which would render performance of his/her duties as a local agency officer or employee less efficient.
- 1.4 Sale or promotion, on district property during employee's or officer's duty hours, of products or services, rental of property or products, or promotion of any academic or nonacademic enterprise in which the employee or officer may have a pecuniary interest.
- 1.5 Acceptance of remuneration, direct or indirect, for tutoring a student who is, or was during the past two semesters, enrolled in a employee's classes. No employee shall engage in tutoring for which he/she receives a fee on any of the campuses of the district nor may any equipment belonging to the district be used for this purpose.
- 1.6 Outside employment and attendance at classes/courses at colleges and universities which conflict with the assigned hours of district employment.
- 1.7 Submission of bids to purchase surplus district personal property when such is offered for public sale by the district, if the officer or employee participated in the decision to declare the property surplus.

- 1.8 Outside activity which involves the use for private gain or advantage of the prestige or influence of the individual's position as a faculty or staff member, or employee of a particular department or office. This includes the use of information not readily available to the general public, gained in the course of district employment, for private gain or advantage, or the gain or advantage of another.
- 1.9 Performance, outside of the district, of any work service for compensation where any part of his/her efforts will be subject to approval or control by any other district employee, unless reported and approved in accordance with Section 2.1 and 2.2 below.

2.0 Implementation

- 2.1 All officers and employees shall apprise their immediate supervisor, in writing, when they are engaged or intend to engage in any activity, employment, or enterprise which could be in violation of the regulations enumerated above.

This requirement is in addition to the reporting requirements for designated employees covered by the district's Conflict of Interest Code.

- 2.2 When a possible incompatibility exists, the issue shall be resolved in the following sequence:

- 2.2.1 The immediate supervisor/manager will notify the employee of his/her belief that activities engaged in by the employee violate a specific prohibition of this [policy/ regulation]. (If initial notification is oral, a follow-up written memo shall be sent both to the employee and Superintendent confirming and detailing this belief).

- 2.2.2 The employee shall be informed of his/ her right to appeal any determination of conflict of interest or incompatible activity and from its application in his/her specific case.

- 2.2.3 If the employee desires to appeal, such appeal will be made to the Superintendent.

- 2.2.4 If, on appeal, the Superintendent determines that the employee's activities do violate this [policy/regulation] the employee will cease those activities or alternatively terminate his/her employment status with the district. Failure to take one of these actions shall be cause for disciplinary action which could result in dismissal.

- 2.3 The existence of procedures in 2.2 above shall not be construed to preclude disciplinary action against employees who willfully violate this [policy/ regulation] by engaging in activities which are clearly inconsistent with or

inimical to his/her district duties or office, nor to take appropriate disciplinary or other action when those activities violate any other policy or regulation.

3.0 Forms and References

California Government Code, Section 1125, et seq.

ATTACHMENT 2
Model Letter to Employees

[To be typed on District Letterhead]

On _____, 200__, the district's Governing Board adopted the attached [policy/regulation] covering Incompatible Activities. This [policy/regulation] is applicable to all officers and employees. It identifies activities which are inconsistent, incompatible, or conflicting with their duties or offices, imposes a duty on all officers and employees to disclose those activities, and specifies actions to be taken by supervisory/management personnel.

You are directed to review this [policy/regulation] and to take any action which may be required of you by it. If you have any questions, please contact _____.