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MEMORANDUM

VIA EMAIL

To: Interested Parties
From: Thomas A. Willis
Date: December 2, 2010
Re: Lieutenant Governor's Office

INTRODUCTION

Supporters of Mayor Newsom have asked whether he may delay assuming the Office of Lieutenant Governor for a few days and remain Mayor, thereby assuring that the duty of deciding who should replace him would fall on the newly-elected Board of Supervisors which would serve with the new Mayor rather than the outgoing Board. As discussed below, the Mayor can delay taking office until after January 8, 2011.

ANALYSIS

The Lieutenant Governor's term of office commences "on the Monday after January 1 following election" (Cal. Const., art. II, § 20), which is January 3. The new members of the Board of Supervisors, however, do not take office until January 8. (San Francisco Charter, § 2.101.)

This raises two questions: (1) does the Mayor assume the office of Lieutenant Governor when his term begins on January 3; and (2) if not, can he delay assuming such office until the new Board is seated?

The answer to the first question is no; an elected official does not assume an office until he or she has taken the oath of office. Article XX, section 3 of the California Constitution states that all public officers "shall, *before they enter upon the duties of their*

respective offices, take and subscribe” the oath of office. (Emphasis added.) Courts and the Attorney General have generally concluded that an officer does not assume office until he or she has taken the oath of office. (*See generally Lungren v. Davis* (1991) 234 Cal.App.3d 806 [judge who was elected to office but had not yet taken oath of office did not commence “term” or otherwise assume office]; 86 Ops.Cal.Atty.Gen. 43, 2003 WL 1866401 [senator’s time of service, for purposes of determining applicability of term limits, began with taking of oath].) Thus, the Mayor would assume office only after he takes the oath.

The answer to the second question is yes: the Mayor can delay taking the oath of office until the new Board is seated. There are at least four reasons supporting this conclusion. First, there is no law requiring a statewide officer to take the oath by a particular time. Government Code section 1770 states that a vacancy in office occurs if an officeholder refuses or neglects to “file his or her required oath or bond within the time prescribed.” (Gov. Code, § 1770(i).) But that provision applies to the “filing” as opposed to the “taking” of the oath and, moreover, is a remnant of a time when there was a deadline for officers to file their oaths and a bond. The Legislature repealed that provision in 1953 and there is no current deadline by which a Lieutenant Governor must take the oath.¹

Second, the right to hold office is a fundamental right and any ambiguities in the laws concerning such a right “are to be resolved in favor of eligibility to office.” (*Carter v. Com. on Qualifications, etc.* (1939) 14 Cal.2d 179, 182.) Put otherwise, any ambiguity in a law arguably disqualifying the Mayor from holding office simply because he delayed taking office for a few days, must be interpreted in favor of the Mayor and against disqualification.

Third, the office will not go vacant. “The Lieutenant Governor . . . shall be elected at the same time and places *and for the same term as the Governor.*” (Cal. Const., art. V, § 11, emphasis added.) The Governor, in turn, holds office “from the Monday after January 1 following the election *until a successor qualifies.*” (Cal. Const., art. V, § 11, emphasis added.) Thus, the current officeholder remains in office until his successor qualifies, through the taking of his oath of office. (*Cf. Norton v. Lewis* (1917) 34 Cal.App. 621, 624 [officer who was elected to new term but failed to take oath for that term continues to serve as a hold-over under his old term]; *see also Bradley v. Clark* (1901) 133 Cal. 196 [the term “qualifies” means the taking of the oath].)

Fourth, policy favors such an outcome. Were the rule so harsh as to require a statewide officer to take the oath on one day only – January 3 – or risk losing his or her office,

¹ Government Code section 18151 states that the oath is required to be taken by “[e]very person who is appointed to a State position not in the State civil service and not otherwise so required by law, within 30 days of the date of appointment.” Although it is not directly on point, the provision suggests it is reasonable for a person to take up to thirty days, after becoming eligible for office, to take the oath.

there would be no accommodation for emergencies, sickness, or other extenuating circumstances. Such a result is directly at odds with the fundamental right to hold office.

Finally, the sole mechanism for challenging a person's right to hold office is through a *quo warranto* proceeding, which may be brought by the Attorney General either on his or her own initiative or upon a complaint from a private party. (Code Civ. Proc., § 803; *Nicolopoulos v. City of Lawndale* (2001) 91 Cal.App.4th 1221, 1225 [Quo warranto is the exclusive remedy to try the right to hold office].) Either way, the Attorney General is the gatekeeper to such an action. Thus, if anyone were inclined to challenge the Mayor's action, he or she could not simply file a lawsuit but would rather have to petition the Attorney General to review the matter after January 3.