TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

KAMALA D. HARRIS
Attorney General

OPINION	:	No. 13-102
of	:	July 25, 2013
KAMALA D. HARRIS Attorney General	:	
DIANE E. EISENBERG Deputy Attorney General	:	

CHARLES WAGNER, as proposed relator, has requested leave to sue in quo warranto upon the following questions:

1. Is Jack Halpin unlawfully exercising the powers and authority of a judge of the Superior Court of Shasta County?

2. Is each or any of the following practices an abuse of discretion, and either illegal or unconstitutional: (a) assigning retired judges for service in the absence of genuinely exigent or extraordinary circumstances; (b) issuing assignment orders that authorize an assigned retired judge to complete and dispose of causes and matters that the judge originally heard during the designated dates of the assignment, even when proceedings in the causes or matters continue after the designated dates; and (c) assigning the same retired judge to judicial service pursuant to successive or multiple temporary assignment orders, which may result in the retired judge serving on a court for a significant length of time?

CONCLUSIONS

1. The question whether Jack Halpin is unlawfully exercising the powers and authority of a judge of the Superior Court of Shasta County does not warrant the initiation of an action in quo warranto because the issue is moot.

2. Quo warranto does not lie to determine whether each or any of the following practices is an abuse of discretion, and either illegal or unconstitutional: (a) assigning retired judges for service in the absence of genuinely exigent or extraordinary circumstances; (b) issuing assignment orders that authorize an assigned retired judge to complete and dispose of causes and matters that the judge originally heard during the designated dates of the assignment, even when proceedings in the causes or matters continue after the designated dates; and (c) assigning the same retired judge to judicial service pursuant to successive or multiple temporary assignment orders, which may result in the retired judge serving on a court for a significant length of time.

The application for leave to sue in quo warranto is therefore DENIED.

ANALYSIS

Background

The Judicial Council is a state entity established by the California Constitution[1] to "improve the administration of justice"[2] and set policies and priorities for the judicial branch of government.[3] The Council is chaired by the Chief Justice of California.[4] Article VI, section 6(e) of the California Constitution directs that:

> The Chief Justice shall seek to expedite judicial business and to equalize the work of judges. The Chief Justice may provide for the assignment of any judge to another court but only with the judge's consent if the court is of lower jurisdiction. A retired judge who consents may be assigned to any court.[5]

---

[1] Cal. Const. art. VI, § 6(a).

[2] Cal. Const. art. VI, § 6(d).

[3] Cal. Rules of Court, rule 10.1(a)(2).

[4] Cal. Rules of Court, rule 10.1(a)(2). The full membership of the Council is set forth in article VI, section 6(a), of the state constitution.

[5] *See also* Govt. Code §§ 68540-68550 (statutes implementing Judicial Council's

The Assigned Judges Program (AJP) is administered by the Administrative Office of the Courts (AOC), which is the staff agency of the Judicial Council.[6] Assisted by the AJP, and pursuant to the constitutional mandate of Article VI, section 6(e), the Chief Justice issues temporary judicial assignment orders to active or retired judges and justices in response to a variety of circumstances, including vacancies, illnesses, disqualifications, and calendar congestion in the courts.[7] Although assignments are generally granted for up to 60 days, a judge can be assigned for any length of time.[8] Assignments can be renewed by the Chief Justice at the request of the presiding judge or justice of a court.[9]

Jack Halpin, the proposed defendant in this matter, was appointed as a superior court judge in 1962, and retired in 1964, without having stood for election. In 1994, Judge Halpin[10] was assigned for judicial service under the auspices of the AJP. Between 1994 and April 2012, Judge Halpin was regularly assigned to the Shasta County Superior Court, pursuant to a series of approximately 200 separate assignment orders by the Chief Justice. Judge Halpin's assignment orders typically provided that Judge Halpin was assigned to sit as a Shasta County Superior Court judge for a designated time period, "and until completion and disposition of all causes and matters heard pursuant to this assignment." The Shasta County Superior Court designated Judge Halpin to be the Supervising Judge of the Family Law Division of the court in 2008, and Judge Halpin served in that capacity through April 2012. We are informed that in April 2012, Judge Halpin announced to the local community his intention to discontinue his service as an assigned judge on the Shasta County Superior Court, and that he was not assigned new family law cases by the court after April 30, 2012. However, we are informed by the AOC that Judge Halpin did not withdraw from the AJP. Indeed, when the Shasta County Superior Court requested that Judge Halpin assist the court with its civil calendar (in non-family law matters) for several days in July and August of 2012, the Chief Justice issued short-term assignment orders to enable that assistance.

Proposed relator Charles Wagner is a party to a dissolution case that dates back to 2004. The case, a family law matter, was assigned to Judge Halpin in 2010. Trial on

---

program for assignment of judges).

[6] *See* Govt. Code § 68500; Cal. Rules of Court, rules 10.1(d), 10.81.

[7] Administrative Office of the Courts, *Fact Sheet, Assigned Judges Program* 1, http://www.courts.ca.gov/documents/Assigned_Judges_Program.pdf (Jan. 2013).

[8] *Id*. at 2.

[9] *Id*.

[10] Although Judge Halpin is not currently a judge, assigned or otherwise, we adopt the customary practice of referring to him by using the title of his former position.

certain issues in the case commenced before Judge Halpin in December 2011. At this time, Judge Halpin was serving under an order assigning him to sit from December 1, 2011 to December 30, 2011, and until completion of all causes and matters heard pursuant to the assignment. The trial was interrupted, and further proceedings related to it were set in the family law department and took place before Judge Halpin in July, August, and September 2012. Mr. Wagner objected that Judge Halpin no longer had the authority to hear the matter, but the Shasta County Superior Court took the position that the December 2011 assignment order provided that authority.

On or around December 11, 2012, Mr. Wagner filed a motion to disqualify Judge Halpin from further proceedings in the dissolution case pursuant to Code of Civil Procedure section 170.1. The motion was granted by operation of law on or about December 21, 2012.

On December 18, 2012, Chief Justice Tani G. Cantil-Sakauye issued the following order:

> Pursuant to the authority conveyed under Article VI, section 6(e) of the California Constitution, it is ordered that the HONORABLE JACK H. HALPIN (Ret.) is no longer authorized to serve as an assigned judge in any case, cause, or matter in the Superior Court of Shasta County, including in connection with any assignments authorized by prior assignment order of the Chief Justice. Effective as of the date of this order, and until such time as the Chief Justice may order otherwise, Judge Halpin shall have no authority, by virtue of assignment by the Chief Justice, to hear any case, cause, or matter in the Superior Court of Shasta County.

Mr. Wagner has requested that this office file suit in the nature of quo warranto against Judge Halpin on its own initiative, or, in the alternative, grant leave to Mr. Wagner to file the suit. For the reasons explained in greater detail below, we must decline Mr. Wagner's request.

Nature of and Criteria for Quo Warranto

Code of Civil Procedure section 803 provides in pertinent part:

> An action may be brought by the attorney-general, in the name of the people of this state, upon his own information, or upon a complaint of a private party, against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise, or against any corporation, either de jure or de facto, which usurps, intrudes into, or unlawfully holds or exercises any franchise, within this state.

An action filed under the terms of this statute is known as a "quo warranto" action. Quo warranto originated in an ancient writ used by the British crown to command the claimant of an office or franchise to show by what warrant or authority ("quo warranto") that person held or exercised the office or franchise.[11] In its modern form, "the remedy of quo warranto belongs to the state, in its sovereign capacity, to protect the interests of the people as a whole and guard the public welfare,"[12] and it is appropriately sought in a number of contexts. For example, quo warranto is the proper remedy to "try title" to public office;[13] that is, to evaluate whether a person has the right to hold a particular office by virtue of eligibility requirements, valid election procedures, the absence of disqualifying factors, etc.

In addition, quo warranto may lie to determine whether a public corporation is unlawfully holding or exercising a right or privilege ("franchise"),[14] and, in this connection, it is an appropriate remedy by which to challenge the validity of the process by which a city or county charter was enacted or amended.[15] In a proper case, quo

---

[11] *See Intl. Assn. of Fire Fighters v. City of Oakland*, 174 Cal. App. 3d 687, 695 (1985).

[12] *Citizens Utils. Co. of Cal. v. Super. Ct.*, 56 Cal. App. 3d 399, 406 (1976); *see also City of Campbell v. Mosk*, 197 Cal. App. 2d 640, 648 (1961).

[13] *Nicolopulos v. City of Lawndale*, 91 Cal. App. 4th 1221, 1225-1226, 1228 (disputes over title to public office are public questions of governmental legitimacy); *Elliott v. Van Delinder*, 77 Cal. App. 716, 719 (1926); 93 Ops.Cal.Atty.Gen. 144, 145 (2010); 81 Ops.Cal.Atty.Gen. 207, 208 (1998).

[14] *E.g. People ex rel. Adams v. City of Oakland*, 92 Cal. 611, 614 (1891).

[15] *Intl. Assn. of Fire Fighters*, 174 Cal. App. 3d at 694 (state delegates part of its sovereign power to public corporations; hence, when such corporations do not comply with state laws governing the lawmaking process, "they are usurping franchise rights as

warranto may also lie to consider whether a private corporation is unlawfully holding or exercising a corporate right or privilege.[16] With one exception not at issue here,[17] a quo warranto action may be brought only by the Attorney General, or by a private party who has secured the Attorney General's consent.[18] The Attorney General is accorded broad discretion in determining whether to grant an application to file a quo warranto action, and the existence of a debatable issue or a legal dispute does not necessarily establish that the issue or dispute requires judicial resolution through the quo warranto procedure.[19]

In determining whether to grant a particular application to sue in quo warranto, we do not resolve the matter on its merits but rather consider the following questions:

---

against [the] paramount authority" of the state); *People ex rel. Kerr v. Co. of Orange*, 106 Cal. App. 4th 914, 920 (2003); *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach*, 36 Cal. 3d 591, 595 (1984); 86 Ops.Cal.Atty.Gen. 127 (2003); 75 Ops.Cal.Atty.Gen. 70, 72 (1992).

[16] *People ex rel. Atty. Gen. v. Dashaway Assn.*, 84 Cal. 114, 117 (1890) (Corporations are creatures of the law; state may forfeit their franchises if they abuse such franchises in a way that affects the public interest); *Chambers v. Sec. Com. & Sav. Bank*, 51 Cal. App. 212, 217 (1921); *and see e.g. Citizens Utils. Co.*, 56 Cal. App. 3d at 406-407 (privately-owned public utility).

[17] *See* Code Civ. Proc. § 811 (authorizing the legislative bodies of local governmental entities to maintain an action against those holding certain franchises within their jurisdiction).

[18] *Oakland Mun. Improvement League v. City of Oakland*, 23 Cal. App. 3d 165, 170 (1972); 67 Ops.Cal.Atty.Gen. 151, 153-154 (1984). Here, Mr. Wagner asserts that his limited financial means makes it more practicable for the Attorney General to initiate and prosecute the quo warranto action. However, because we conclude that a quo warranto action on the questions presented is not warranted, we do not further evaluate whether such an action would more appropriately be brought by the Attorney General, or by Mr. Wagner with the consent of the Attorney General. We note that as a general matter the Attorney General rarely pursues an action in quo warranto on his or her own initiative (*see Nicolopulos*, 91 Cal. App. 4th at 1228; *and see* Cal. Atty. Gen., *Quo Warranto – Nature of Remedy*, http://oag.ca.gov/opinions/nature-of-remedy), and most quo warranto actions are prosecuted by a private party (who is termed the "relator") upon the authorization of the Attorney General. For the sake of convenience, we refer herein to Mr. Wagner's application as an application for leave (or our authorization) to sue.

[19] *City of Campbell*, 197 Cal. App. 2d at 650 (public interest is paramount consideration in exercise of Attorney General's discretion); 86 Ops.Cal.Atty.Gen. 76, 79-81 (2003); 72 Ops.Cal.Atty.Gen. 15, 20 (1989); 67 Ops.Cal.Atty.Gen. at 153-154.

(1) Is quo warranto the proper remedy to resolve the issues that are presented?

(2) Does the application present a substantial issue of fact or law appropriate for judicial resolution?

(3) Would granting the application serve the overall public interest?[20]

We must answer all three questions in the affirmative in order to grant a quo warranto application.[21] As a general rule, we have viewed the need for judicial resolution of a substantial question of fact or law as a sufficient "public purpose" to warrant the granting of leave to sue in quo warranto.[22] However, certain circumstances will override this general rule. For example, we typically find that granting a quo warranto application would not be in the public interest when the issues have been or are being litigated in another judicial action,[23] or when the issue of an allegedly unlawfully-held office is moot because the term of office has expired or has only a short time remaining.[24] In addition, we have considered the existence of alternative remedies in determining whether the issuance of leave to sue would serve the public interest,[25] and a quo warranto application

[20] 73 Ops.Cal.Atty.Gen. 197, 200 (1990); 72 Ops.Cal.Atty.Gen. at 20. In a number of our opinions, we have used only the latter two questions to articulate our standards for granting leave to sue in quo warranto. *See e.g.* 93 Ops.Cal.Atty.Gen. at 145; 89 Ops.Cal.Atty.Gen. 55, 56 (2006); 88 Ops.Cal.Atty.Gen. 25, 26 (2005). But, as we recently observed, such formulations necessarily encompass "the more fundamental question as to whether quo warranto is the appropriate legal remedy in the given circumstances." 95 Ops.Cal.Atty.Gen. 50, 54 (2012).

[21] 73 Ops.Cal.Atty.Gen. at 200; 72 Ops.Cal.Atty.Gen. at 20.

[22] 89 Ops.Cal.Atty.Gen. at 61; 85 Ops.Cal.Atty.Gen. 90, 94 (2002).

[23] *See e.g.* 86 Ops.Cal.Atty.Gen. at 79-81; 74 Ops.Cal.Atty.Gen. 31, 32 (1991); 73 Ops.Cal.Atty.Gen. 183, 190 (1990); 73 Ops.Cal.Atty.Gen. 109, 110 (1990); 36 Ops.Cal.Atty.Gen. 317, 319 (1960).

[24] *See e.g.* 87 Ops.Cal.Atty.Gen. 179-180 (2004); 83 Ops.Cal.Atty.Gen. 181, 184 (2000); 82 Ops.Cal.Atty.Gen. 6, 11 (1999); 75 Ops.Cal.Atty.Gen. 10, 14 (1992).

[25] 75 Ops.Cal.Atty.Gen. at 74; 74 Ops.Cal.Atty.Gen. at 32; 12 Ops.Cal.Atty.Gen. 340, 342 (1949).

may be denied when such other remedies are available.[26] With this legal framework in mind, we proceed to the questions presented by Mr. Wagner's application.

1. Is Jack Halpin unlawfully exercising the powers and authority of a judge of the Superior Court of Shasta County?

As noted above, a quo warranto action is the proper legal means for testing title to public office; indeed, where available, it is usually the exclusive remedy for testing title to public office.[27] In *People v. Kwolek*, the court of appeal stated that quo warranto is the proper method to challenge the authority of an assigned judge to sit on a court.[28] The *Kwolek* court did not, however, discuss the attributes of a "public office" for purposes of Code of Civil Procedure section 803. Our Supreme Court has stated that, "[g]enerally, quo warranto is appropriate only where there is involved a public office in the sense that the incumbent exercises some of the sovereign powers of government."[29] An elected judge, or a judge appointed by the Governor to fill a vacancy, is an "incumbent" in that he or she both occupies a position that is not transient or occasional, but rather has some permanence and continuity,[30] and exercises judicial functions of government. Such a person clearly holds a public office.[31] An assigned active judge is not an incumbent of the court to which he or she is assigned,[32] and a retired judge sitting on assignment is not

---

[26] 89 Ops.Cal.Atty.Gen. 285, 287-288 (2006); 86 Ops.Cal.Atty.Gen. at 79-81; 80 Ops.Cal.Atty.Gen. 290, 292-293 (1997); 77 Ops.Cal.Atty.Gen. 65, 70 (1994) ("Generally speaking, a section 803 proceeding is maintained where it is the only available remedy."); 9 Ops.Cal.Atty.Gen. 1, 2 (1947).

[27] *Nicolopulos*, 91 Cal. App. 4th at 1225 (title to an office cannot be tried by mandamus, injunction, writ of certiorari, or petition for declaratory relief); *Visnich v. Sacramento Co. Bd. of Educ.*, 37 Cal. App. 3d 684, 690 (1974); 93 Ops.Cal.Atty.Gen. 104, 109 (2010); 89 Ops.Cal.Atty.Gen. at 56.

[28] *People v. Kwolek*, 40 Cal. App. 4th 1521, 1531 (1995) (holding that municipal court judge temporarily assigned to the superior court had proper authority to preside over defendant's trial).

[29] *Stout v. Democratic Co. Central Comm.*, 40 Cal. 2d 91, 94 (1952).

[30] S*ee Moore v. Panish*, 32 Cal. 3d 535, 545 (1982); 87 Ops.Cal.Atty.Gen. at 57.

[31] *See People ex rel. Chapman v. Rapsey*, 16 Cal. 2d 636, 640, 642, 644 (1940) (characterizing city judge as a public official for purposes of quo warranto action).

[32] *Bach v. McNelis*, 207 Cal. App. 3d 857, 871 (1995); *Kwolek*, 40 Cal. App. 4th at 1530-1531 (quoting from *Bach*); 79 Ops.Cal.Atty.Gen. 159, 162 (1996).

an incumbent of any court.[33] Nevertheless, an assigned judge exercises all of the authority of an incumbent judge of the court for the period of the assignment,[34] and this is true also of a retired judge sitting on assignment.[35] Mindful of the observation that no one definition of public office will adequately and effectively cover every situation,[36] we find that a quo warranto proceeding is the proper method by which to challenge the right of a retired judge to hold the position of assigned judge and to exercise the powers and authority of a judge of the court to which the retired judge is assigned.[37]

However, an action in quo warranto may be filed "only to right an existing wrong and not to try moot questions."[38] In this instance, we conclude that the Chief Justice's December 18, 2012, order renders moot the question whether Judge Halpin is *currently* unlawfully usurping, intruding into, or holding the position of assigned judge, and we deny leave to sue with respect to this issue on that basis.

Both Mr. Wagner and Judge Halpin attempt to persuade us to discount the Chief Justice's order, though on different grounds.[39] We nonetheless find the Chief Justice's

---

[33] *See People v. Super. Ct. (Mudge)*, 54 Cal. App. 4th 407, 412 (1997) (noting that the assignment of a retired judge to act temporarily as a regular sitting judge is *sui generis*).

[34] *Fay v. Dist. Ct. of App.*, 200 Cal. 522, 529 (1927); *Bach*, 207 Cal. App. 3d at 871; *Mosk v. Super. Ct.*, 25 Cal. 3d 474, 483 (1979).

[35] *Pickens v. Johnson*, 42 Cal. 2d 399, 406 (1954) (retired judge sitting on assignment to the superior court is vested with powers of superior court judge during the length of the assignment).

[36] *See Chapman*, 16 Cal. 2d at 639; 68 Ops.Cal.Atty.Gen. 337, 341 (1985).

[37] We note that we have previously determined, in a different context, that a retired judge sitting on assignment has the equivalent status of a judicial officer. *See* 68 Ops.Cal.Atty.Gen. 127, 128-130 (1985) (retired judge on assignment is subject to same immunity and indemnification provisions as those governing public officers acting in a judicial capacity).

[38] *People v. City of Whittier*, 133 Cal. App. 316, 324 (1933).

[39] The Chief Justice's order was transmitted to us by the AOC. In a letter accompanying the order, the AOC also asserted that Mr. Wagner's quo warranto application should be denied as moot. Mr. Wagner does not contest the authenticity of the Chief Justice's order, but rather argues that we must ignore the AOC's correspondence because the AOC is not named as a party to the application. But the mere fact that the AOC transmitted the order in question to our offices has no bearing on the legal significance of that order.

order to be dispositive. Judicial precedent has established that the Chief Justice, as Chair of the Judicial Council, is invested with "discretion of the broadest character" in the assignment of judges.[40] As our Supreme Court has stated: "The manner, method, or criteria for selection of duly qualified assigned judges is . . . within the discretion of the Chief Justice in the exercise of her constitutional authority to make the assignments."[41] It is "a well-settled rule of law that where there are no restrictive provisions the power of appointment carries with it the power of removal."[42] Accordingly, the Chief Justice's discretion in the making of judicial assignments generally encompasses both the non-renewal and the termination of such assignments.[43] We conclude that the Chief Justice's

---

Judge Halpin requests that if we deny Mr. Wagner's application on the ground of mootness, we do so only on the basis of the disqualification of Judge Halpin pursuant to Code of Civil Procedure section 170.1. Judge Halpin further states that he is "unwilling to concur" that the Chief Justice's order of December 18, 2012 is valid. Essentially, Judge Halpin suggests that we may consider the issue of mootness only as it pertains to Judge Halpin's authority to hear further causes or matters in Mr. Wagner's dissolution case, but not as it pertains to Judge Halpin's exercise of authority as an assigned judge in other cases or matters. We reject this suggestion. Judge Halpin has presented no arguments or materials, nor have we been otherwise informed of any, that would negate the facial validity of the Chief Justice's order of December 18, 2012.

[40] *People v. Ferguson*, 124 Cal. App. 221, 231 (1932).

[41] *Mosk*, 25 Cal. 3d at 483; *see also Pickens*, 42 Cal. 2d at 410 (Chair of Judicial Council is "logical constitutional officer in whom to vest the power of assignment"); *Mudge*, 54 Cal. App. 4th at 412; *People v. Swain*, 33 Cal. App. 4th 499, 503 (1995).

[42] *Fee v. Fitts*, 108 Cal. App. 551, 556 (1930). *See also* Govt. Code § 1301 ("Every office, the term of which is not fixed by law, is held at the pleasure of the appointing power.").

[43] We note in this regard that the AJP "Standards and Guidelines for Judicial Assignments" states that representations of assignments staff "are not intended to give rise to any contractual rights or obligations, nor should they be construed as a guarantee of a judicial assignment or of a specific type or period of assignment. Assignments are within the sole discretion of the Chief Justice." AOC, *AJP Handbook; Standards and Guidelines for Judicial Assignments* 1 (Oct. 2012). The AOC *Fact Sheet* for the AJP also states, at page 4, that the Chief Justice may remove an assigned judge from the program; *see* http://www.courts.ca.gov/documents/Assigned_Judges_Program.pdf (Jan. 2013). We do not here assert that there could *never* be any circumstances under which the termination of an assignment or the removal of a judge from the AJP could be challenged. However, the contemplation of such circumstances in the abstract is beyond the scope of this opinion, and, as we have stated, we are aware of no facts that would give

December 18, 2012 order effectively terminated Judge Halpin's status as an assigned judge with the Shasta County Superior Court, and thereby terminated Judge Halpin's authority to exercise the powers of a judge of that court.

We are aware that Mr. Wagner's initial quo warranto application was completed, and was in transmission to our office, before the Chief Justice's December 18, 2012 order was issued. Nevertheless, the public interest will not be served by allowing quo warranto to proceed merely because the issue raised by the application was mooted by events that occurred shortly after the application was submitted.[44] We are informed by the Shasta County Superior Court that Judge Halpin has not been scheduled to hear, and has not heard, any matter, case, or cause in that court since the Chief Justice issued her order of December 18, 2012.[45] Quo warranto is a "preventative remedy addressed to preventing a *continuing exercise* of an authority unlawfully asserted rather than to correcting what has already been done under that authority."[46] We have repeatedly declined to grant leave to sue in a quo warranto proceeding where the alleged unlawful term of office has expired, or the question of unlawfulness has become moot because of subsequent events.[47]

---

rise to a challenge of the termination of the assignment in the present matter.

[44] *See People v. Muehe*, 114 Cal. App. 739, 740 (1931) (quo warranto proceeding will not be maintained "merely to try the abstract title to the office").

[45] Mr. Wagner submitted a reply brief in January 2013 which alleged that Judge Halpin was being scheduled to hear matters even after the issuance of the Chief Justice's order, but Mr. Wagner has since acknowledged through his attorney that he was in error on this point.

[46] *Citizens Utils. Co.*, 56 Cal. App. 3d at 406 (emphasis added). In this connection, we note that, under the "de facto officer" doctrine, Judge Halpin's rulings and orders while sitting on assignment are valid and binding. *See In re Redev. Plan for Bunker Hill*, 61 Cal. 2d 21, 42 (1964) (persons claiming to be public officers while in possession of an office, ostensibly exercising their functions lawfully, are de facto officers, and their acts done within the scope and by the apparent authority of office are valid and binding); 82 Ops.Cal.Atty.Gen. 219, 223 n. 3 (1999); 74 Ops.Cal.Atty.Gen. 116, 121 (1991). The de facto officer doctrine applies to judges. *Ensher, Alexander & Barsoom, Inc. v. Ensher*, 238 Cal. App. 2d 250, 255 (1966). In other words, Judge Halpin's rulings and orders in individual cases would not be invalidated or undermined by a successful quo warranto proceeding. As a general matter, complaints about judicial misconduct on the part of an assigned judge are handled by the AOC, with the assistance of the presiding judge of the court involved (Cal. Rules of Court, rule 10.603(c)(4)(E)), and allegations of legal error may be grounds for an appeal.

[47] *See e.g.* 87 Ops.Cal.Atty.Gen. at 179; 87 Ops.Cal.Atty.Gen. 30, 34-35 (2004); 84

Mr. Wagner cites one of our recent opinions, Opinion No. 12-602, in an attempt to avoid a finding of mootness with respect to Judge Halpin's status. This opinion addresses the applicability of the incompatible offices doctrine to a very specific, and unusual, factual situation.[48] The facts before us in the present matter are in no way analogous to those addressed by Opinion No. 12-602, and thus we find no support in that opinion for Mr. Wagner's arguments regarding mootness.

As to Question 1, then, we find that the issue of Judge Halpin's current authority to exercise the powers of a superior court judge is moot, and therefore that a quo warranto proceeding on that issue would not be in the public interest.

2. Do certain practices used in connection with the assignment of judges constitute an abuse of discretion or violate the law?

Mr. Wagner alleges that the three practices described in Question 2 have been used in connection with the assignment of Judge Halpin and other retired judges, and contends that the practices effectively violate sections 16(b) and (c) of Article VI of the California Constitution. Section 16(b) provides in pertinent part that "[j]udges of superior courts shall be elected in their counties at general elections except as otherwise necessary to meet the requirements of federal law," and section 16(c) states:

Ops.Cal.Atty.Gen. 206, 207 (2001); 82 Ops.Cal.Atty.Gen. at 223-224; 72 Ops.Cal.Atty.Gen. 63, 71 (1989); 25 Ops.Cal.Atty.Gen. 223, 224 (1955).

[48] 95 Ops.Cal.Atty.Gen. 67, 67 (2012). The doctrine of incompatible offices provides that if a person holds two offices that are incompatible, the first office to which the person acceded is deemed forfeited. In this opinion, we considered the situation of a person who was appointed to be a city planning commissioner, and, while serving in that capacity, was elected to the board of a sanitary district. Later, while still serving on the sanitary district board, the person was re-appointed to the planning commission. He subsequently resigned from the planning commission, and thereafter occupied only one office, that of sanitary district director. We determined that the resignation did not necessarily moot the question of whether the doctrine of incompatible offices applied. We based this conclusion solely on the fact that the person's re-appointment to the planning commission could be construed as having reversed the sequence in which the offices were occupied, thus making the sanitary district directorship the office that was subject to forfeiture. *See* 95 Ops.Cal.Atty.Gen. at 72-73. The present matter does not involve any alleged violation of the incompatible office doctrine, much less does it call for a determination as to whether one such office, versus the other, should have been forfeited. Accordingly, our earlier opinion has no bearing on the present circumstances.

> Terms of judges of superior courts are six years beginning the Monday after January 1 following their election. A vacancy shall be filled by election to a full term at the next general election after the second January 1 following the vacancy, but the Governor shall appoint a person to fill the vacancy temporarily until the elected judge's term begins.

Specifically, Mr. Wagner contends that the practices of issuing assignment orders that authorize an assigned retired judge to complete and dispose of causes and matters that the judge originally heard during the designated dates of the assignment, even when proceedings in the causes or matters continue after the designated dates (Question 2(b)), and assigning the same retired judge to judicial service pursuant to successive or multiple temporary assignment orders, which may result in the retired judge serving on a court for a significant length of time, sometimes many years (Question 2 (c)), transform ostensibly temporary assignments of retired judges to superior courts into indefinite and permanent assignments. In so doing, he argues, these practices thereby deprive the electorate of its right to elect and to remove (by failing to re-elect) superior court judges every six years.[49] Mr. Wagner seeks to have the practice described in Question 2(b) declared to be an abuse of discretion and illegal, and the practice described in Question 2(c) declared to be an abuse of discretion and unconstitutional.[50] Mr. Wagner also seeks to have the assignment of retired judges in the absence of genuinely exigent or extraordinary circumstances (Question 2(a)) declared to be an abuse of discretion and unconstitutional.

First, we observe that Judge Halpin, the only proposed defendant named in Mr. Wagner's application, does not issue assignment orders, nor does he make policy for or

---

[49] Mr. Wagner also alludes to a concern (citing to a dissenting opinion in the case of *Pickens v. Johnson*, 42 Cal. 2d at 419 (Carter, J., concurring and dissenting)) that a sitting judge could be defeated at an election, but then subsequently assigned, thereby continuing to function as a judge and thwarting the will of the electors. We note that Government Code section 68549 (enacted after *Pickens* was decided) provides that a judge who has been defeated in an election for his or her office "shall not be deemed a retired judge within the meaning of Section 6 of Article VI of the California Constitution," and therefore is not eligible for assignment. It is also the Chief Justice's express policy that a retired judge shall not be considered for assignment if the judge was defeated in the last judicial election in which the judge was required to stand in order to retain his or her judicial office. AOC, *AJP Handbook; Standards and Guidelines for Judicial Assignments* 4 (Oct. 2012).

[50] Mr. Wagner does not identify the precise temporal threshold at which he believes the aggregate length of service of an assigned retired judge becomes an abuse of discretion and unconstitutional.

administer the AJP. Rather, the Chief Justice, as Chair of the Judicial Council, makes assignments, with the assistance of the AOC and the AJP, and the assignment orders are then implemented by the courts. None of these persons or entities has been named by Mr. Wagner as a party to the quo warranto application, and it appears to us that they would be indispensable parties if such an action were to proceed. However, because we believe that our substantive reasons for denying the application would not change if any of these persons or entities were added as parties, we may simply proceed with our analysis of the questions Mr. Wagner has posed.

Our main consideration with respect to Question 2 is whether quo warranto is the appropriate form of action for the litigation of Mr. Wagner's claims or for the relief he seeks. We conclude that it is not. Mr. Wagner does not here claim that the Chief Justice has "usurped" the office she holds, so the issues raised in Question 2 do not implicate title to a public office. We construe the essence of Mr. Wagner's claim to be that the Chief Justice has used her assignment powers in a way that is *ultra vires* – that is, beyond the scope of power allowed by law.[51] In this case, the claim is that the current Chief Justice, and previous Chief Justices who allegedly have also engaged in the practices described in Question 2, have exceeded the assignment authority provided by Article VI, section 6(e). However, while a claim of *ultra vires* conduct might sustain a quo warranto action involving a corporate franchise granted by the state,[52] neither the Chief Justice nor the Judicial Council is a corporation holding a franchise for purposes of Code of Civil Procedure section 803. Rather, they exercise the sovereign power of the state pursuant to constitutional mandate. We find no basis in section 803 or in any judicial decision for the invocation of a quo warranto action in connection with the issues presented in Question 2, and we have not considered quo warranto to be the proper vehicle for challenging the legality of the actions of legitimate state officers under the type of circumstances presented here.[53] For example, in a previous opinion, we rejected quo warranto as an appropriate form of action for the contention that the Governor had exceeded his

---

[51] *See Black's Law Dictionary* 1311-1312 (Bryan A. Garner ed., abr. 9th ed., West 2010) (defining "*ultra vires*").

[52] *See e.g. Dashaway Assn.*, 84 Cal. at 117 (1890) *People ex rel. Clark v. Milk Producers' Assn. of Central Cal.*, 60 Cal. App. 439, 441-445 (1923); *see also* Code Civ. Proc. § 811.

[53] To the extent that Mr. Wagner's application could alternatively be construed as seeking the ouster of a class of currently assigned, long-serving retired judges, where there are no allegations that any of the judges personally violated a rule or lacked a requisite qualification when they took their assignments, the application also fails to state appropriate grounds for a quo warranto action.

constitutional and statutory authority with regard to actions he took in connection with a statewide initiative.[54]

We conclude that the issues raised in Question 2 do not constitute proper grounds for a quo warranto action, and for that reason, we deny the application as to those issues.[55] The denial of this application with respect to Question 2 does not preclude Mr. Wagner from bringing a different form of legal action to challenge the validity of the Chief Justice's assignment orders or the Judicial Council's and the AOC's/AJP's assignment policies.[56]

Because the issue presented in Question 1 is moot, and the issues presented in Question 2 are not appropriate to bring in a quo warranto proceeding, the application for leave to sue in quo warranto is DENIED.

*****

[54] 75 Ops.Cal.Atty.Gen. at 71-73.

[55] In his application, Mr. Wagner makes a number of assertions and allegations about the compensation of retired judges sitting on assignment. Such compensation has been set by the Legislature in Government Code section 68543.5. Mr. Wagner does not allege that any assigned judge's compensation violates the prescriptions of this statute, and he does not request any particular relief regarding the subject of compensation. It is well established that the compensation of superior court judges, including retired judges sitting by assignment, is within the control of the Legislature. *See e.g. Pickens*, 42 Cal. 3d at 406-407; 72 Ops.Cal.Atty.Gen. 258, 261 (1989). Therefore, any complaints or concerns about the compensation of assigned retired judges must be addressed to the Legislature, and would not constitute the basis for a quo warranto application.

[56] *Pulskamp v. Martinez*, 2 Cal. App 4th 854, 860 (1992) (when quo warranto is not available, private citizen may proceed to seek relief by other means).