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EDMUND G. BROWN JR.
Attorney General

OPINION	:	No. 08-801
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of	:	December 31, 2009
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EDMUND G. BROWN JR.	:	
Attorney General	:	
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MARC J. NOLAN	:	
Deputy Attorney General	:	
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THE COMMISSION ON THE STATUS OF WOMEN has requested an opinion on the following questions:

1. Are otherwise eligible military veterans residing in California entitled to all state-funded veterans' benefits, including state-funded veterans' housing, regardless of sexual orientation or gender?
2. Are registered domestic partners of eligible military veterans residing in California entitled to all state-funded military benefits available to spouses of eligible military veterans, including state-funded veterans' housing?

CONCLUSIONS

1. Otherwise eligible military veterans residing in California are entitled to all state-funded veterans' benefits, including state-funded veterans' housing, regardless of sexual orientation or gender.

2. Registered domestic partners of eligible military veterans residing in California are entitled to all state-funded military benefits available to spouses of eligible military veterans, including state-funded veterans' housing.

ANALYSIS

In 1946, the Legislature created the California Department of Veterans Affairs¹ (Department) to assume the duties and powers of various related predecessor agencies.² The Department's mission is to provide California's veterans and their families with "aid and assistance in presenting their claims for veterans' benefits under the laws of the United States," and "beneficial opportunities through direct low-cost loans to acquire farms and homes," and to provide aged or disabled veterans "rehabilitative, residential, and medical care and services in a home-like environment at the California Veterans Homes."³

To be eligible for admission into a California Veterans Home,⁴ a veteran must be a California resident over 62 years of age or disabled; must be eligible for hospitalization or domiciliary care under the regulations of the United States Department of Veterans Affairs; and must have served on active duty in the United States armed forces and either honorably discharged or discharged "under honorable conditions."⁵ Spouses of eligible

¹ 1946 Stat. ch. 114 § 2; Mil. & Vet. Code § 63.

² See Mil. & Vet. Code § 70(a).

³ See <http://www.cdva.ca.gov/AboutUs/>.

⁴ Veterans Homes are located in Yountville, Barstow, Chula Vista, Lancaster, and Ventura, and additional facilities are planned for West Los Angeles, Fresno, and Redding. See <http://www.cdva.ca.gov/Homes/>.

⁵ Mil. & Vet Code § 1012(a). An honorable discharge and a discharge under honorable conditions are two of three general administrative classifications of military discharge; the third, unfavorable discharge, is also designated as "under other than honorable conditions."

veterans may also live at a Veterans Home if space is available.⁶ Other state-funded veterans' benefits provided by the Department, such as home or farm purchase assistance and education assistance,⁷ also require the veteran to have received an honorable or under honorable conditions discharge.⁸ A variety of other state-funded benefits are available to veterans and their families, as well. Some are administered by the Department and some by other state agencies, and each carries its own eligibility criteria (such as discharge classification, prisoner of war status, service-related disability, etc.).⁹

The questions presented here arise because of uncertainty about whether lesbian, gay, bisexual or transgender (LGBT) veterans and their registered domestic partners, who are otherwise eligible to receive state veterans' benefits,¹⁰ are affected by the United States military's policy on homosexual service members.¹¹ This policy gained national attention in 1993, when Congress passed the National Defense Authorization Act for Fiscal Year 1994.¹² Section 571 of that legislation, entitled "Policy Concerning Homosexuality in the Armed Forces," was codified as Section 654 of Title 10 of the United States Code and came to be known as "Don't Ask Don't Tell." In general, the policy states that a member of the armed forces "shall be separated" from military service if he or she has (1) "engaged in, attempted to engage in, or solicited another to engage in

⁶ Mil. & Vet. Code § 1012(a)(1)-(4).

⁷ See Mil. & Vet. Code §§ 981.1-981.8 (educational assistance), 985-988.5 (farm and home purchase).

⁸ Mil. & Vet. Code § 980.

⁹ Among these benefits are: veterans' preferences in state civil service examinations (Govt. Code §§ 18971-18979); college tuition fee waivers for veterans and their dependents (Educ. Code § 66025.3); educational assistance to veterans and their dependents (Educ. Code §§ 66025.6, 66025.8; Mil. & Vet. Code §§ 890-899); disabled veterans' business enterprise opportunities (Pub. Cont. Code §§ 10115, 10115.15); waived or reduced fees for hunting and sport fishing licenses/permits for disabled veterans (Fish & Game Code §§ 3033, 3038, 7150, 7151); and property tax exemptions (Rev. & Tax. Code § 205.5).

¹⁰ The focus of our inquiry in this opinion is whether an individual's gender or sexual orientation has any effect on the individual's entitlement to state-funded veterans' benefits. We assume for purposes of our analysis that an interested applicant for state veteran's benefits is otherwise eligible to receive those benefits.

¹¹ Although the question does not specifically refer to intersex veterans (those with ambiguous gender characteristics), our reasoning and conclusions apply equally to them.

¹² Pub. L. No. 103-160, 107 Stat. 1547 (1993).

a homosexual act or acts;” (2) “stated that he or she is a homosexual or bisexual, or words to that effect;” or (3) “married or attempted to marry a person known to be of the same biological sex.”¹³ We are told that one of the effects of the Don’t Ask Don’t Tell policy is that many LGBT military veterans assume that they may legally be denied benefits available to other veterans based on their gender or sexual orientation.¹⁴ According to the California Commission on the Status of Women, the policy has contributed to “a widespread belief among military veterans that discrimination against LGBT veterans is acceptable in any military setting,” and an uncertainty among registered domestic partners of LGBT veterans about “their rights to military spousal benefits, particularly the right to live in veterans’ housing with their partners.”¹⁵ We take this opportunity to make clear that, under the laws of California, neither military veterans nor their registered domestic partners may be discriminated against in the provision of state-funded veterans’ benefits on the basis of their gender or sexual orientation, the federal Don’t Ask Don’t Tell policy notwithstanding.

1. Nondiscrimination Against LGBT Military Veterans

The first question asks whether military veterans in California are entitled to state-funded veterans’ benefits, including veterans’ housing, regardless of sexual orientation or gender. We begin with the text of Government Code section 11135, which bars discrimination on the basis of sex or sexual orientation in state programs and benefits:

(a) No person in the State of California shall, on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state.

. . .

(e) As used in this section, “sex” and “sexual orientation” have the same meanings as those terms are defined in subdivisions (p) and (q) of Section 12926.

¹³ 10 U.S.C. § 654(b).

¹⁴ Ltr. from Cal. Commn. on the Status of Women to Supervising Deputy Attorney General Susan Lee, July 8, 2008, at 2.

¹⁵ *Id.*

(f) As used in this section, “race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability” includes a perception that a person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics.

Because the questions here involve state-funded benefits, we conclude that this antidiscrimination statute squarely applies, and bars any discrimination based on a veteran’s sex or sexual orientation. The term “sexual orientation” is defined for purposes of this statute as “heterosexuality, homosexuality, and bisexuality,”¹⁶ meaning that lesbian, gay, and bisexual military veterans are expressly covered.

Furthermore, we believe that transgender veterans also fall under the antidiscrimination statute’s protection. We use the term “transgender individuals” to include those who adopt the dress, appearance, or behavior of the opposite sex; those who have undergone medical treatment to change their physical sex characteristics; and those who otherwise identify themselves as a member of the opposite sex. All of these traits are encompassed within the antidiscrimination statute, which defines “sex” in a way that expressly includes “a person’s gender identity and gender related appearance and behavior whether or not stereotypically associated with the person’s assigned sex at birth.”¹⁷ Based on the applicable statutory definitions of “sex,” “gender,” and “sexual orientation,” then, we readily conclude that transgender and intersex individuals are protected under the antidiscrimination statute.

With regard to state-funded veterans’ housing in particular, we note that that the antidiscrimination provisions of section 11135 mirror those generally applicable to business establishments under the Unruh Civil Rights Act,¹⁸ and to all providers of housing under the Fair Employment and Housing Act.¹⁹ Furthermore, the Department’s own regulations state that it shall not discriminate on the basis of gender or sexual

¹⁶ Govt. Code §§ 11135(e), 12926(q).

¹⁷ Govt. Code §§ 11135(e) (“sex” and “sexual orientation” are as defined in Govt. Code § 12926(p)(q); Govt. Code 12926(p) (“sex” includes “gender” as defined in Pen. Code § 422.56); Pen. Code § 422.56(c) (“gender” includes “a person’s gender identity and gender related appearance and behavior whether or not stereotypically associated with the person’s assigned sex at birth.”).

¹⁸ Civ. Code § 51.

¹⁹ Govt. Code § 12955.

orientation in making admissions to a Veterans Home.²⁰ Thus, state-funded veterans' benefits, including admission to Veterans Homes, may not be denied to qualifying veterans on the basis of their gender or sexual orientation.

There is a further question, however: that is, whether an LGBT service member who is separated from service on the basis of his or her sexual orientation under the Don't Ask Don't Tell policy is thereby rendered ineligible for state-funded benefits that require an "honorable" or "under honorable conditions" discharge? The class of discharge, of course, is a matter of federal military law and is beyond the power of the Department to affect. However, it appears to us that a discharge based on homosexual conduct would not usually render the veteran ineligible.

Again, we note that eligibility requirements for admission into a Veterans Home and for some other veterans' benefits include either honorable discharge or discharge under honorable conditions.²¹ Official military policies and procedures provide that, where the sole basis of a service member's separation from the military is "homosexual conduct," the discharge is to be characterized as "honorable" or "under honorable conditions" under ordinary conditions. Discharge for "homosexual conduct" is characterized as "other than honorable" only when there are aggravating circumstances in connection with one or more completed, attempted, or solicited homosexual acts.²² Accordingly, it does not appear that a service member's sexual orientation, in and of itself, will cause him or her to receive an "other than honorable conditions" discharge, and this will be true even if the member's sexual orientation formed the basis of a "homosexual conduct" separation from service under Don't Ask Don't Tell. Unless it is an "other than honorable" discharge, a discharge premised solely on the member's sexual orientation or gender would not disqualify him or her for state-funded veterans' benefits.²³

²⁰ Cal. Code Regs. tit. 12 § 501(b), states: "The Veterans Home shall provide equal opportunity for admission to all eligible applicants regardless of race, color, creed, national origin, religion, ancestry, sex, marital status, disability, religious or political affiliation, age or sexual orientation."

²¹ Mil. & Vet. Code § 1012(a).

²² See Department of Defense Instruction No. 1332.14 Enclosure 3 ¶ 8.c.(1)-(7) at 19; Department of Defense Instruction No. 1332.30 Enclosure 7 ¶ 2.b.(2) at 20. The Instructions are available on the "Department of Defense Issuances" website, located at <http://www.dtic.mil/whs/directives>.

²³ We note that the military has established internal administrative procedures for those discharged service members who wish to contest or appeal the characterization of

We conclude in response to the first question that otherwise eligible military veterans residing in California are entitled to state-funded veterans' benefits, including state-funded veterans' housing, regardless of sexual orientation or gender.

2. Rights of Registered Domestic Partners

We turn now to the second question posed, that is, whether registered domestic partners of military veterans are entitled to the state-funded military benefits that are available to spouses of military veterans, including state-funded veterans' housing. To answer this question, we consult the California Domestic Partner Rights and Responsibilities Act of 2003 (Domestic Partner Act), the current provisions of which took effect on January 1, 2005.²⁴ The Domestic Partner Act permits same-sex couples (and some opposite-sex couples in which one or both individuals are over the age of 62), who share a common residence, to file a Declaration of Domestic Partnership with the Secretary of State.²⁵

Family Code section 297.5 enumerates rights and responsibilities of registered domestic partners.²⁶ Further strengthening the explicit language in section 297.5(a), the

discharge that they have received. *See* 10 U.S.C. § 1553. A discussion of those procedures, however, is beyond the scope of this opinion.

²⁴ 2003 Stat. ch. 421 § 4.

²⁵ Fam. Code § 297; *see Koebke v. Bernardo Heights Country Club*, 36 Cal. 4th 824, 837 (2005).

²⁶ Family Code section 297.5 states, in relevant part:

(a) Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses.

(b) Former registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon former spouses.

Legislature expressed its intent, in an uncodified portion of the Domestic Partner Act, that the Act be “construed liberally in order to secure to eligible couples who register as domestic partners the full range of legal rights, protections and benefits, as well as all of the responsibilities, obligations, and duties to each other, to their children, to third parties and to the state, as the laws of California extend to and impose upon spouses.”²⁷ In addition, the California Supreme Court has observed that Family Code section 297.5 uses

(c) A surviving registered domestic partner, following the death of the other partner, shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon a widow or a widower.

. . .

(e) To the extent that provisions of California law adopt, refer to, or rely upon, provisions of federal law in a way that otherwise would cause registered domestic partners to be treated differently than spouses, registered domestic partners shall be treated by California law as if federal law recognized a domestic partnership in the same manner as California law.

(f) Registered domestic partners shall have the same rights regarding nondiscrimination as those provided to spouses.

(g) No public agency in this state may discriminate against any person or couple on the ground that the person is a registered domestic partner rather than a spouse or that the couple are registered domestic partners rather than spouses, except that nothing in this section applies to modify eligibility for long-term care plans pursuant to Chapter 15 (commencing with Section 21660) of Part 3 of Division 5 of Title 2 of the Government Code.

. . .

(j) Where necessary to implement the rights of registered domestic partners under this act, gender-specific terms referring to spouses shall be construed to include domestic partners.

²⁷ 2003 Stat. ch. 421 § 15.

the “broadest terms possible to grant to, and impose upon, registered domestic partners, the same rights and responsibilities as spouses in specified areas of laws whether they are current, former or surviving domestic partners.”²⁸ We therefore construe the Domestic Partner Act’s provisions liberally in applying them to the question before us.

As we have observed, spouses of eligible veterans may be admitted to Veterans Home facilities where space is available. Similarly, spouses of eligible veterans may access other state-funded veterans’ benefits, such as tuition fee waivers at state colleges and universities,²⁹ and civil service examination preferences.³⁰ Under the Domestic Partner Act,³¹ a veteran’s registered domestic partner must be afforded the same rights as a veteran’s spouse. Further, the Act specifically prohibits the Department and other state agencies from discriminating against the registered domestic partners of veterans.³²

Finally, we note that the California Supreme Court’s recent decision in *Strauss v. Horton*,³³ does not alter our conclusion. If anything, the *Strauss* opinion provides further support for our reasoning. In *Strauss*, the Court held that the passage of Proposition 8 (also known as the Marriage Protection Act) in the November 2008 general election effected a valid amendment to the California Constitution.³⁴ The amendment now appears in Article I, section 7.5 of the Constitution and states, in its entirety: “Only marriage between a man and a woman is valid or recognized in California.” The *Strauss* court observed that Proposition 8 had the effect of overturning the Court’s earlier holding, in *In re Marriage Cases*,³⁵ that the Constitution as it then existed required that

²⁸ *Koebke*, 36 Cal. 4th at 838.

²⁹ Educ. Code § 66025.3(a)(1) (where spouse is married to a “totally disabled” military veteran or has survived veteran’s death and not remarried); *see also* Mil. & Vet. Code § 890(b).

³⁰ Govt. Code §§ 18973, 18973.1 (credits available to veterans’ surviving spouses and spouses of “100 percent disabled” veterans).

³¹ Fam. Code § 297.5(a), (b), (c).

³² Fam. Code § 297.5(g). It should be noted that this provision contains a limited exception—*i.e.*, that section 297.5 does not modify the eligibility requirements for long-term care insurance plans that the California Public Employees Retirement System makes available to various public employees and specified family members. *See* Govt. Code §§ 21660 et seq. This exception does not affect the specific conclusion we reach here.

³³ 46 Cal. 4th 364 (2009).

³⁴ *Strauss*, 46 Cal. 4th at 463.

³⁵ 43 Cal. 4th 757 (2008).

the designation “marriage” be made equally available to opposite-sex and same-sex couples.³⁶ The *Strauss* court also held, however, that Proposition 8 did *not* repeal or abrogate the holding in *Marriage Cases* that the California Constitution protects the rights of same-sex couples to “choose one’s life partner and enter with that person into a committed, officially recognized, and protected family relationship that enjoys all of the constitutionally based incidents of marriage.”³⁷ We believe that the *Strauss* opinion reaffirms that same-sex couples enjoy the same panoply of rights under California law as opposite-sex couples, other than the right to have their relationships designated as “marriages.”³⁸

Therefore, in response to the second question, we conclude that registered domestic partners of eligible military veterans residing in California are entitled to all state-funded military benefits available to spouses of eligible military veterans, including state-funded veterans’ housing.

³⁶ *Strauss*, 46 Cal. 4th at 411-412; *Marriage Cases*, 43 Cal. 4th at 845-847.

³⁷ *Strauss*, 46 Cal. 4th at 388; *Marriage Cases*, 43 Cal. 4th at 829.

³⁸ Following *Strauss*, the Legislature amended Family Code section 308 to provide that same-sex couples who are validly married in another state or country after November 5, 2008 enjoy the same rights and benefits as do spouses in California -- except designation of their relationship as a “marriage” -- without having to register as domestic partners. See 2008 Stat. ch. 625.