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OFFICE OF THE ATTORNEY GENERAL  
State of California

GEORGE DEUKMEJIAN  
Attorney General

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OPINION	:	No. CV 77-243
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of	:	<u>February 6, 1979</u>
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GEORGE DEUKMEJIAN	:	
Attorney General	:	
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Susan J. Orton	:	
Deputy Attorney General	:	
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SUBJECT: RECOVERING SALARIES—The county counsel has discretion to institute the action of recovering salaries where incorrect procedures were used to increase county supervisors' salaries. No conflict is presented by such discharge of duty.

The Honorable Charles D. Haughton, Lake County Counsel, has requested the opinion of this office on the following question:

1. Where incorrect procedures were used to increase county supervisors' salaries, is a recovery action under Government Code section 26525 properly brought by the district attorney or the county counsel?
2. Is such action discretionary with either officer?
3. Is the county counsel placed in a conflict by bringing such an action?

The conclusions are as follows:

1. The county counsel is the appropriate official to institute an action under Government Code section 26525.
2. The county counsel has discretion to institute the action.
3. No conflict is presented by county counsel's discharge of this duty.

## ANALYSIS

### 1. County Counsel's Role

At issue here are the respective duties and powers of the county counsel and the district attorney in recovering salary payments allegedly approved by illegal procedures.

In 1971, the Lake County Board of Supervisors adopted Ordinance No. 643, which established annual salaries of \$5,400 for each board member. In 1972, the board adopted Ordinance No. 703, which required, among other things, that supervisors' salaries be reasonably related to the prevailing rates of pay in other public jurisdictions. By successive resolutions, the board thereafter purported to raise members' salaries, reaching an annual rate of \$10,320 in 1975.

We are informed that the above actions were taken openly and as a matter of public record. However, a question has now arisen as to whether the resolutions for salary increases, under the 'prevailing wage' ordinance of 1972, meet the constitutional requirement that salaries be set by ordinance subject to referendum. (Cal. Const., art. XI, § 1, subd. (b).)

In view of this factual background, we have been asked whether the county counsel or the district attorney would be the proper official to institute action under Government Code section 26525 to recover these salary increases.

Government Code section 26525<sup>1</sup> provides in pertinent part:

"If the board of supervisors without authority of law orders any amount paid as salary . . . and the money is actually paid . . . the district attorney shall institute suit in the name of the county to recover the money paid, and 20 percent damages for the use thereof. . . ."

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<sup>1</sup> All section references are to the Government Code.

The question of the county counsel's authority to institute actions under this section has arisen because section 26529's enumeration of specific county counsel responsibilities<sup>2</sup> Omits any mention of actions to recover salaries under section 26526.

Prior to its amendment in 1951, this section provided that the county counsel discharge all civil duties vested by law in the district attorney. It has been suggested that this omission from the 1951 amendment inferentially connotes an exclusion of section 26525 from the county counsel's duties.<sup>3</sup> Given the plenary role of the county counsel<sup>4</sup> in civil actions under sections 26529 and 27642 and the civil character of section 26525 under these facts, it is concluded that the county counsel is authorized to bring civil actions under section 26525.

This conclusion is consistent with the California Supreme Court's interpretation of section 26525. In *Wilson v. Sharp* (1954) 42 Cal. 2d 675, 678, the court observed that county counsel had "the functions and duties of a district attorney" under section 26525 in a salary repayment suit involving improper hiring procedures. The listing of specific county counsel duties in section 26529 has been viewed, in dictum, merely as setting forth activities which the district attorney is prohibited from performing. (*Safer v. Superior Court* (1975) 15 Cal. 3d 230 fn. 10; see also 56 Ops. Cal. Atty. Gen. 53 (1973); 38 Ops. Cal. Atty. Gen. 121, fn. 2 (1961); 61 Ops. Cal. Atty. Gen. 283, 294–295 (1978); and *Board of Supervisors v. Simpson* (1951) 36 Cal. 2d 671, 674.)

For these reasons it is concluded that the county counsel is the appropriate officer to institute recovery proceedings under these facts.

In so concluding, we recognize that both before and after the amendment of section 26529 in 1951, some nominally civil matters were and remain the responsibility of the district attorney, that is, those which are auxiliary to the enforcement of the criminal law or relate closely to the criminal functions of the public prosecutor. (See, e.g., *Board of Supervisors v. Simpson, supra*, 36 Cal. 2d 671, 674–675; 61 Ops. Cal. Atty. Gen. 40 (1978); 56 Ops. Cal. Atty. Gen. 53, 56–57 (1973); I.L. 77–159; I.L. 66–83.) Such a matter,

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<sup>2</sup> Section 26529 provides in pertinent part:

"In counties which have a county counsel, the county counsel shall discharge all the duties vested in the district attorney by Sections 26520, 26522, 26523, and 26524. The county counsel shall defend or prosecute all civil actions and proceedings in which the county or any of its officers is concerned or is a party in his official capacity. . . ."

<sup>3</sup> See Sutherland, *Statutory Construction*, sections 847.23–847.23.

<sup>4</sup> Section 27642 provides as follows: "Whenever the board of supervisors appoints a county counsel pursuant to this chapter, he shall discharge all the duties vested by law in the district attorney other than those of a public prosecutor."

however, is not presented herein.

## 2. Discretionary Nature of Duty

Because an action under section 26525 necessarily involves determination of legal and factual questions, an element of discretion is built into its terms. For this reason, section 26525 has been construed by the California Supreme Court as vesting discretionary powers in the county counsel. (*Wilson v. Sharp, supra*, 42 Cal. 2d at p. 678.)<sup>5</sup>

This conclusion is also supported by an analysis of the legislative history of section 26525. By Statutes 1947, chapter 427, the predecessor section was amended to delete language declaring an imperative duty” to institute suit. Deletion of such an express provision is presumed, under well-established canons of statutory construction, to intend a substantial change in the law. (*People v. Schmel* (1975) 54 Cal. App. 3d 46, 51.) Given this legislative history, it is concluded that the word “shall” should be construed as permissive rather than mandatory. (*Jacobs v. State Bar* (1977) 20 Cal. 3d 191; Sutherland, *Statutory Construction* (4th ed. 1973), § 22.29.)

## 3. Conflict of Interest

It has been suggested that a conflict of interest is implicit in the conclusion that the county counsel, as a board appointee, possesses discretion to recover salaries paid to members of the board. In 28 Ops. Cal. Atty. Gen. 293 (1956) this office considered and rejected a parallel suggestion that a conflict was presented by the county counsel’s role in ruling upon the legality of board members’ travel claims. Because the counsel’s statutory duties to evaluate such claims were duties running to the county, no conflict was created by the potential rejection of individual board members’ claims. Under these facts, the client of the county counsel is Lake County; accordingly, the instituting of actions against individual board members is not precluded. (See also *Ward v. Superior Court* (1977) 70 Cal. App. 3d 23, 32; 28 Ops. Cal. Atty. Gen. 293 (1956).)

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<sup>5</sup> Cf. *Board of Supervisors v. Simpson* (1951) 36 Cal. 2d 671, where a mandatory duty to file red light abatement proceedings was inferred from a statute which required prosecution upon the directive of the board of supervisors in contrast to section 26525, which requires no board order “in order to maintain the suit;” see also *Boyne v. Ryan* (1893) 100 Cal. 265, in which the discretion of the prosecutor was upheld.