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OPINION	:	No. 79-1204
	:	
of	:	<u>June 24, 1980</u>
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SUBJECT: BOARD OF SUPERVISORS—The clerk of the board of supervisors, established pursuant to section 25100.5 of the Government Code, is a county officer. A county board of supervisors may establish a single budget unit consisting of the board of supervisors, the clerk of the board of supervisors, and their aides and deputies, subject to the limitation that the board may not effect, through the process of devising budget units, a reordering of statutorily established governmental functions.

The Honorable Milton Goldinger, County Counsel, Solano County, has requested an opinion on the following questions:

1. Is a clerk of the board of supervisors, established pursuant to section 25100.5 of the Government Code, a county officer?
2. May a county board of supervisors establish a single budget unit consisting of the board of supervisors, the clerk of the board of supervisors, and their aides and deputies?

CONCLUSIONS

1. The clerk of the board of supervisors, established pursuant to section 25100.5 of the Government Code, is a county officer.

2. A county board of supervisors may establish a single budget unit consisting of the board of supervisors, the clerk of the board of supervisors, and their aides and deputies, subject to the limitation that the board may not effect, through the process of devising budget units, a reordering of statutorily established governmental functions.

ANALYSIS

The present question concerns the official and budgetary status of the clerk of the board of supervisors.

The position of clerk of the board of supervisors and a general enumeration of his duties is provided for in sections 25100 to 25105 of the Government Code.¹ Section 25100 provides that the county clerk is the ex officio board of supervisors' clerk unless otherwise provided by law. (See also § 26801.) The law does authorize other arrangements in section 25100.5 which states:

“The board of supervisors of any county may provide by ordinance that the clerk of the board of supervisors may be appointed by the board in the same manner as other county officers are appointed. In such counties, the county clerk is not ex officio clerk of the board of supervisors.

“The clerk of the board of supervisors shall perform those duties prescribed by law for the county clerk as ex officio clerk of the board of supervisors or for the clerk of the board of supervisors and such additional duties as the board of supervisors shall prescribe by ordinance. Such person may perform all the duties vested in the county clerk other than those vested in the county clerk as ex officio clerk of the superior court or registrar of voters and may take acknowledgments and administer and certify oaths in the performance of such person's official duties.”

The first question presented is whether the clerk appointed pursuant to that section is a county officer. Section 24000 which provides who “[t]he officers of a county are,” enumerates twenty-two specific officers including “a district attorney,” “a sheriff,” “a county clerk,” and “members of the board of supervisors.” The clerk of the board of

¹ Hereafter all section references are to the Government Code unless otherwise specified.

supervisors is not one of the officers specifically enumerated in that section. However, in addition to the enumeration of specific county officers, the section also includes as officers of a county “such other officers as are provided by law.” (§ 24000(w).) Thus the question that arises here is whether the clerk of the board of supervisors is one of the “other officers provided by law.” In considering this question we turn first to the words of the statute respecting the clerk of the board of supervisors, as set forth above.²

In this regard we note that section 251 00.5 provides that the board may appoint its clerk “in the same manner as other county officers are appointed.” (Emphasis added.) As stated in *Scally v. Pacific Gas & Electric Co.* (1972), 23 Cal. App. 3d 806, 819: “The words ‘other’ or ‘any other’ following an enumeration of particular classes should be read therefore as *other such like* and to include only others of *like kind or character*” (Court’s emphasis.) Thus in the present situation, the fact that the Legislature referred to *other* county officers,” rather than providing merely that the clerk was to be appointed in the same manner as “county officers,” is a clear indication that the Legislature intended to include such clerk within that class of positions it has designated as “county officers.” Such reasoning was applied in *Possekel v. O’Donnell* (Ill. App. 1977) 366 N.E.2d 589, 594, where in evaluating a similar statutory use of the word “other,” the court said: “the language of the statute specifically applies only to ‘teachers and other certified educational employees.’ The word ‘other’ must mean that the teachers must also be certified.”

Thus by the terms of the statute in question here the Legislature has classified the clerk of the board of supervisors as a county officer.³

We recognize, however, that in all cases the statutory classification might not be controlling. As was pointed out by the Supreme Court in *Cossiter v. Pool* (1921) 187 Cal. 181:

“Its definition and application depend not upon what the particular

² “In construing a statute to determine the Intent of the Legislature the court ‘turns first to the words themselves for the answer.’” (*Tracy v. Municipal Court* (1978) 22 Cal. 3d 760, 764; see also *Palo, Verde, Faculty Asta. v. Palo, Verde, Peninsula Unified Sch. Dist.* (1978) 21 Cal. 3d 650, 658.)

³ We note that in 22 opt. Cal. Atty. Gen. 177, 181 (1953) this office declared that “it does not appear that the Clerk of the Board of Supervisors was regarded as a county officer, at least with respect to those county officers who were to be elected when their appointment was not provided for by the Legislature” However, that opinion was issued before the enactment in 1959 of section 25100.5 which, as noted, classified the clerk of the board of supervisors with “other county officers.” That opinion is thus not controlling with respect to an evaluation of the present legislation concerning the board of supervisors’ clerk. (*Cf.* 54 Ops. Cal. Atty. Gen. 51 (1971).)

office in question may be called, nor upon what a statute may call it, but upon the power granted and wielded, the duties and functions performed and other circumstances which manifest the true character of the position and make and mark it a public office, irrespective of its formal designation.” (*Id.* at p. 186. *Accord, People ex rel. Chapman v. Rapsey* (1940) 16 Cal. 2d 636, 639–640; *Spreckels v. Graham* (1924) 194 Cal. 516, 532; *City Council v. McKinley* (1978) 80 Cal. App. 3d 204, 210; *Bennett v. Superior Court* (1955) 131 Cal. App. 2d 841, 843–844.)

The Supreme Court in a number of cases has extensively delineated those characteristics of a position which would “make and mark it a public office.” For example, in *Patton v. Board of Health, etc.*, (1899) 127 Cal. 388, the leading case on the subject, the Court stated:

“It seems to be reasonably well settled that where the legislature creates the position, prescribes the duties, and fixes the compensation, and these duties pertain to the public and are continuing and permanent, not occasional or temporary, such position or employment is an office and he who occupies it is an officer. In such a case, there is an unmistakable declaration by the legislature that some portion, great or small, of the sovereign functions of government are to be exercised for the benefit of the public, and the legislature has decided for itself that the employment is of sufficient dignity and importance to be deemed to be an office.” (*Id.* at p. 398.)

A similar evaluation of the nature of a public office was set forth by the Supreme Court in *Spreckels v. Graham, supra*, 194 Cal. 516, at page 530:

“But two elements now seem to be almost universally regarded as essential . . . [to the definition of public office or public officer]. First, a tenure of office ‘which is not transient, occasional or incidental,’ but is of such a nature that the office itself is an entity in which incumbents succeed one another and which does not cease to exist with the termination of incumbency, and, second, the delegation to the officer of some portion of the sovereign functions of government, either legislative, executive, or Judicial.”

Subsequently in this same vein, the Supreme Court in *People ex rel. Chapman v. Rapsey, supra*, 16 Cal. 2d 636, declared that:

““ . . . so far as definition has been attempted, a public office is said to be the right, authority, and duty, created and conferred by law—the tenure of which is not transient, occasional, or incidental—by which for a given period

an individual is invested with power to perform a public function for public benefit.

“““ . . . The individual who occupies such an office is a public officer. He is a public agent and as such acts only on behalf of his principal, the public, whose sanction is generally considered as necessary to give to acts performed by the officer the authority and power of a public act or law

“““Of the various characteristics attached to public office by definition, some are regarded as indispensable, and others while not in themselves conclusive, are yet said to indicate more or less strongly the legislative intent to create or not to create an office. One of the prime requisites is that the office be created by the Constitution or authorized by some statute. And it is essential that the incumbent be clothed with a part of the sovereignty of the state to be exercised in the interest of the public.”””

Of particular relevance to our present inquiry is the decision in *Coulter v. Pool*, *supra*, 187 Cal. 181, which considered the question: what is a county officer? In that case it was stated:

“A public office is ordinarily and generally defined to be the right, authority, and duty, created and conferred by law, the tenure of which is not transient, occasional, or incidental, by which for a given period an individual is invested with power to perform a public function for the benefit of the public. [Citation omitted.]

“A public officer is a public agent and as such acts only on behalf of his principal, the public, whose sanction is generally considered as necessary to give the act performed by the officer the authority and power of a public act or law. The most general characteristic of a public officer, which distinguishes him from a mere employee, is that a public duty is delegated and entrusted to him, as agent, the performance of which is an exercise of a part of the governmental functions of the particular political unit for which he, as agent, is acting. There are other incidents which ordinarily distinguish a public officer, such, for instance, as a fixed tenure of position, the exaction of a public oath of office and, perhaps, an official bond, the liability to be called to account as a public offender for misfeasance or nonfeasance in office and the payment of his salary from the general county treasury. [Citations omitted.] As a matter of course, in keeping with these definitions, a county [Court’s emphasis] officer is a *public* [Court’s emphasis] officer and may be specifically defined to be one who fills a position usually

provided for in the organization of counties and county governments and is selected by the political subdivision of the state called the ‘county’ to represent that governmental unit, continuously and as part of the regular and permanent administration of public power, in carrying out certain acts with the performance of which it is charged in behalf of the public.” (*Id.* at pp. 186–187. *Accord, Bennett v. Superior Court, supra*, 131 Cal. App. 2d at pp. 843–844.)

Despite these substantial explications upon the question,⁴ the courts have regarded the concept of public office as being beyond the devising of a precise definition that would be applicable to all cases. (*Patton v. Board of Health, etc., supra*, 127 Cal. at p. 393; *Coulter v. Pool, supra*, 187 Cal. at 186; *Spreckles v. Graham, supra*, 194 Cal. at p. ¶ 30; *People ex rel. Chapman v. Rapsey, supra*, 16 Cal. 2d at 639; see *Pockman v. Leonard* (1952) 39 Cal. 2d 676, 683.) Nonetheless, three characteristics emerge from these cases as those which are fundamental to the status of “public office”: (1) The position must be established by legislation or by the Constitution; (2) the position must be permanent and not transient or occasional; (3) the position must involve the exercise of “some portion great or small of the sovereign functions of government” (*Patton v. Board of Health, etc., supra*, 127 Cal. at p. 398) or, as characterized in *Coulter v. Pool, supra*, 187 Cal. at p. 187, the “exercise of a part of the governmental functions . . .”⁵ (See *City Council v. McKinley, supra*, 80 Cal. App. 3d 204, 210, for a recent case summarizing the characteristics of a public office.)

Applying this formulation to the position of clerk of the board of supervisors, we note first that the position is established by statute within the “organization of counties and

⁴ See 57 Ops. Cal. Atty. Gen. 303, 305–306 (1974) for an extensive compilation of the cases and of this office’s opinions which have considered the question of what constitutes a public office.

⁵ With respect to the element of discretion, of the four Supreme Court cases giving major consideration to the characteristics of a public office, two of them do not mention that element. (*Coulter v. Pool, supra*, 187 Cal. 181; *People ex rel. Chapman v. Rapsey, supra*, 16 Cal. 2d 636; see also *Abbott v. McNutt* (1933) 218 Cal. 225.) The two cases that do mention the element of discretion (*Patton v. Board of Health, etc., supra*, 127 Cal. at p. 399; *Spreckles v. Graham, supra*, 194 Cal. at p. 531) do not include that element among those that they term “requisite” (*Patton v. Board of Health, etc., supra*, at p. 393) or essential” (*Spreckles v. Graham supra* at p. 530) to a definition of public office. It would appear that the element of discretion is thus not a *sine qua non* of public office. Nonetheless the providing by the clerk of the board of supervisors of a description of the proceedings and actions of the board, pursuant to the clerk’s duty to enter in the minutes “a full and complete record of the proceedings of the board. . . .” (§ 25101(b)), would appear to entail the exercise of discretion as would the clerk’s administering of a substantial recordkeeping operation pursuant to his duty to keep and maintain as public records all ‘books, records, and accounts of the board. . . .’ (§ 25104.)

county governments.” (See *Coulter v. Pool, supra*, at p. 187, and see div. 2 (commencing with § 24000), pt. 2, ch. 1, art. 6 of the Gov. Code which places the office of the clerk of the board of supervisors in the context of county government organization.)

Next we note that the position is not transient or occasional. An examination of the statutorily specified duties of the clerk indicates that, in the terms of *Coulter v. Pool, supra*, he is “to represent . . . [the county] continuously and as part of the regular and permanent administration of public power . . .” With respect to such duties section 25101 provides:

“The clerk of the board shall:

“(a) Attend each session of the board of supervisors of his county and attend committee meetings when requested so to do.

“(b) Keep and enter in the minute book of the board a full and complete record of the proceedings of the board at all regular and special meetings, including the entry in full of all resolutions and of all decisions on questions concerning the allowance of accounts. The vote of each member on every question shall be recorded.

“(c) Immediately after each meeting of the board, deliver to and leave with the auditor all demands allowed for the payment of money.

“(d) File and preserve, or dispose of pursuant to law, all petitions, applications, and other papers and records deposited with him.

“(e) Authenticate with his signature and the seal of the board and file each ordinance passed by the board.”

See also section 25103 requiring the records and minutes of the board to “be signed by the chairman and the clerk”; section 25104 vesting in the clerk custody of the books, records, and accounts of the board; section 25121 requiring every ordinance to be “attested by the clerk”; and section 29703 requiring the clerk to file memorandums on actions taken by the board on claims, and to attest and sign endorsements on such claims when transmitted to the auditor.

Thus the statutes place ongoing, as opposed to occasional or transient, duties and responsibilities upon the office of the clerk of the board of supervisors.

Finally, we note that by having the authority and duty to provide the symbols and the evidence of authenticity for the official actions of the county’s governing and legislative

body (§§ 25101(e); 25121), and to compile and maintain permanent public records of such official actions (§§ 25101(b); 25104), the clerk of the board of supervisors exercises some portion of the “sovereign” or “governmental” functions of the county.

We conclude therefore that the characteristics of the position of clerk of the board of supervisors satisfy the criteria for a public office and that such clerk is thus a county officer.⁶

Supporting this conclusion is *Bennett v. Superior Court*, *supra*, 131 Cal. App. 2d 841 which applied the criteria for public office to the clerk of the justice court, a position analogous in the court context to that of the clerk of the board of supervisors. In that case the court determined that the position of justice court clerk satisfied such criteria and therefore such clerk “occupied a public office.” (*Id.* at p. 844]. See also *Steele v. Board of Trustees* (1932) 121 Cal. App. 419, 422, holding that the clerk of a school board is an officer.)

Concluding that the clerk of the board of supervisors is a county officer, we consider the next question presented which is whether the board of supervisors has the authority to include the office of clerk of the board with the board of supervisors in a single budget unit, as opposed to having to establish a separate budget unit for that office.

The budgetary procedures of a county are governed by the so-called “County Budget Act.” (§ 29000 *et seq.*; see *Hicks v. Board of Supervisors* (1977) 69 Cal. App. 3d 228, 239–240.) Under that act a “budget” is defined as “a comprehensive plan of financial operations embodying an estimate of proposed requirements for expenditure appropriations and provisions for reserves of a given period and the means of financing such requirements, as expressed in the official actions of the board of [supervisors].” (§ 29009.)

A “budget unit” (the concern of the present question) is defined as:

“ . . . that classification of the expenditure and reserve requirements of the financial operational plan into appropriately identified accounting or cost centers deemed necessary and desirable for purposes of control of the financial operations thereof. Except as otherwise provided by law, budget units may be devised at the discretion* of the board as follows:

⁶ One who occupies a public office is a public office (*People ex rel. Chapman v. Rapsey*, *supra*. 16 Cal. 2d at p. 640; *Bennett v. Superior Court*, *supra*, 131 Cal. App. 2d at p. 843), and a public officer who carries out his public duties for the county is a county officer. (*Coulter v. Pool*, *supra*, 187 Cal. at p. 187.)

“(a) An organizational unit such as, a department, a court, an office, a division of a department or an office, an institution, a board or commission, or any other administrative unit.

“(b) A service activity or unit.

“(c) A specific expenditure program.

“(d) A specific type of expenditure. . . .” (§ 2901.1.)

In essence, then a “budget unit” is a grouping of logically related elements of government into a unit for purposes of financial control within the budgetary process. (See State Controller, Accounting Standards and Procedures for Counties (1961), div. IV, §§ 12.4–12.5.)⁷

What is of primary significance to our consideration of the present question is the fact that section 29011 expressly provides that “[e]xcept as otherwise provided by law budget units may be devised at the discretion of the board” according to the specified types of groupings. Accordingly, it was recognized in *Hicks v. Board of Supervisors*, *supra*, 69 Cal. App. 3d at p. 244, that “the board of supervisors has wide discretion in budgetary matters, including discretion in devising budgetary units and classifying expenditures pursuant to Government Code section 29011”

With respect to the budget unit being considered here, combining within the same unit the county’s board of supervisors with its clerical adjunct would appear to be the combining of functionally related components, and to be well within the “wide discretion” of the board to devise, for purposes of financial control, a budget unit on the basis of an “organizational unit” (§ 29011(a)) or on the basis of a “service activity or unit.” (§ 29011(b).) In this regard we note that title 2, California Administrative Code, section 944(a) designates “legislative and administrative” as a single function and activity for purposes of classifying budget units. (See Cal. Admin. Code, tit. 2, § 945.)

However, the Court in *Hicks v. Board of Supervisors*, *supra*, also expressed a significant limitation upon the board’s authority to devise budget units. In that case the board sought by the process of devising budget units to transfer the district attorney’s

⁷ The State Controller Is, by statute, directed to “prescribe uniform accounting procedures for counties” and to promulgate the rules and regulations necessary to effectuate such procedures. (§§ 29020, 30200.) Such regulations are found in title 2, California Administrative Code sections 901 to 1015.

investigators to the jurisdiction of the sheriff's office. This attempt was rejected by the court which concluded that "this action was not a budgetary action" and that "the law does not vest the board with authority to transfer control of one officer's statutory function to another officer." (69 Cal. App. 3d at p. 244.)

This limitation upon the use of the budgetary power specified in the *Hicks* case was relied upon by the court in *Brandi v. Board of Supervisors* (1978) 84 Cal. App. 3d 598, 601-602, where it was concluded that the board of supervisors does not have the "authority to use its budgetary power" to control the sheriff in the execution of his statutory responsibilities.

Thus the budgetary power vested in the board of supervisors does not afford to the board any power, that it does otherwise possess, to reorder the distribution of county governmental functions.

However, with respect to the forming of the budget unit being considered here, merely combining the board of supervisors and its staff with the clerk of the board and his staff within the same budget unit, if done for the purpose of exercising financial control, does not of itself effect a reallocation of governmental functions. We therefore conclude that the board of supervisors may establish a single budget unit comprising these two entitles for budgetary and financial control purposes.
