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OPINION	:	No. 79-1206
	:	
of	:	<u>March 27, 1980</u>
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SUBJECT: DELEGATION OF AUTHORITY—This opinion deals with the California Unemployment Insurance Appeals Board and its delegation of authority to different members of the board to appoint, direct, and control the personnel of the board in coordination with and subject to the approval of the chairperson of the board.

The California Unemployment Insurance Appeals Board has requested an opinion on the following questions:

1. May the California Unemployment Insurance Appeals Board delegate to the Senior Administrative Law Judge, the Chief Administrative Law Judge, or the Secretary-Chief Counsel of the board, its authority to appoint, direct, and control the personnel of the board in coordination with and subject to the approval of the chairperson of the board?

2. Does a majority vote of the membership of the California Unemployment Insurance Appeals Board constitute an effective delegation of its authority to appoint, direct, and control the personnel of the board? Does a member of the board who has refused to delegate such authority retain the authority to participate in the appointment, direction, and control of the personnel of the board?

CONCLUSIONS

1. The California Unemployment Insurance Appeals Board may delegate to the Senior Administrative Law Judge, the Chief Administrative Law Judge, or the Secretary-Chief Counsel of the board, its authority to appoint, direct, and control, in coordination with and subject to the approval of the chairperson of the board, its own immediate staff and assistants. The board may not delegate to anyone other than the Chief Administrative Law Judge its authority to appoint, direct, and control the referees and their supervisors and staffs within the field offices.

2. The authority of the California Unemployment Insurance Appeals Board to appoint, direct, and control the personnel of the board may be effectively delegated by a majority vote of the membership of the board. Such authority is that of the board and not of its individual members; a member of the board as an individual retains no authority to participate in the appointment, direction, and control of the personnel of the board once such authority has been effectively delegated to another. An individual as a member of the board may participate in any further action of the board relating to such delegation.

ANALYSIS

Section 401 of the Unemployment Insurance Code¹ provides as follows:

There is in the Department of Employment Development an Appeals Division consisting of the California Unemployment Insurance Appeals Board and its employees. The appeals board consists of five members appointed by the Governor, subject to the approval of the Senate. Two of the members of the appeals board shall be attorneys at law admitted to practice in the State of California. The other three members need not be attorneys. Each member of the board shall devote his full time to the performance of his duties. The chairman and each member of the board shall receive the annual salary provided for by Chapter 6 (commencing with Section 11550) of Part 1 of Division 3 of Title 2 of the Government Code. The Governor shall designate the chairman of the appeals board from the membership of the appeals board. The person so designated shall hold the office of chairman at the pleasure of the Governor. The chairman shall designate a member of the appeals board to act as chairman in his absence.”

¹ Hereinafter, all section references are to the Unemployment Insurance Code unless otherwise indicated.

Section 315 provides:

“The Appeals Division within the Department of Employment Development includes the appeals board and its clerical staff and assistants and the referees and their supervisors and clerical staff and assistants.”

The California Unemployment Insurance Appeals Board (“board”) is authorized to appoint, direct and control all of the personnel of the Appeals Division. (§ 403.) The first inquiry is whether the board may delegate to the Senior Administrative Law Judge, the Chief Administrative Law Judge, or the Secretary-Chief Counsel of the board, such authority in coordination with and subject to the approval of the chairperson of the board. We begin with the general provisions of the Government Code. Section 7 of said code provides:

“Whenever a power is granted to, or a duty is imposed upon, a public officer, the power may be exercised or the duty may be performed by a deputy of the officer or by a person authorized, pursuant to law, by the officer, unless this code expressly provides otherwise.”

With respect to the state civil service specifically, section 18572 of said code provides:

“Whenever a power is granted or a duty imposed upon an appointing power, the power may be exercised or the duty performed by a deputy of the appointing power or by a person authorized pursuant to law by him, unless it is expressly otherwise provided.”

The term “appointing power” includes any person or group having authority to make appointments to positions in the state civil service. (Gov. Code, § 18524.) Thus, under the provisions of the Government Code, the authority of an appointing power may be exercised by a person other than a deputy of the appointing power only if authorized by the appointing power and only if such authorization is given pursuant to law.

We turn, therefore, to the provisions of the Unemployment Insurance Code Section 6 provides:

“Whenever a power is granted to, or a duty imposed on any person or board by any provision of this code, it may be exercised or performed by any deputy or person authorized by the person or board to whom the power is granted or on whom the duty is imposed, unless it is expressly provided that the power or duty shall be exercised or performed only by the person or board to whom the power is granted or on whom the duty is imposed.”

By its express terms, section 6 provides that a power of the board may be exercised by a person authorized by it, unless by some other express provision such power shall be exercised by the board alone. Section 403 provides:

“All personnel of the Appeals Division shall be appointed, directed and controlled only by the appeals board or its authorized deputies or agents to whom it may delegate such powers.

“The appeals board shall prepare a budget covering the necessary administrative costs of the Appeals Division. Such budget shall not be subject to change by the director except as agreed to by the appeals board. In the event that agreement cannot be reached, the final decision shall rest with the Governor. The director shall furnish the equipment, supplies, housing and nonpersonal and housekeeping services required by the Appeals Division and shall perform such other mechanics of administration as the appeals board and the director may agree upon.”

While the authority to appoint, direct and control the personnel of the Appeals Division may be exercised “only by the appeals board,” as distinguished from the Department of Employment Development, sections 6 and 403, read together, clearly provide that such authority may be delegated by the board to its own authorized deputies or agents.

Although the board may not delegate a function constituting a public trust the exercise of which inescapably requires the use of such reason and discretion as may only be accomplished by board action (*cf. Webster v. Board of Education* (1903) 140 Cal. 331; *Knight v. City of Eureka* (1898) 123 Cal. 192, 194–195; 1 Ops. Cal. Atty. Gen. 442 (1943)), it is sufficient for purposes of this analysis to note that the power to delegate authority respecting personnel is expressly provided by statute. (§ 403.)

Nevertheless, the power to delegate such authority is not without constraint. We pause, therefore, to reflect upon the specific proposal in question. The board would designate the Senior Administrative Law Judge, or in his absence or inability to perform, the Secretary-Chief Counsel, as the higher authority appointing power in coordination with and subject to the approval of the chairperson of the board, and the Chief Administrative Law Judge, or in his absence or inability to perform, the Secretary-Chief Counsel, as the lower authority appointing power in coordination with and subject to the approval of the chairperson of the board. The term “administrative law judge” is synonymous with the term “referee.”

As suggested by the provisions of section 315, *supra*, the personnel of the Appeals Division are divided into two groups: (1) the appeals board and its clerical staff and

assistants, and (2) the referees and their supervisors and clerical staff and assistants. The second group is located in and responsible for the operation of the various district or field offices throughout the state in which the initial appeal from a decision of the Department of Employment Development is heard. (*Cf.* § 1334.) This group, referred to in the subject proposal as the “lower authority” is administered and supervised by a Chief Administrative Law Judge appointed directly by the board. (§ 405.) In this regard, section 406 provides:

“The duties of the chief referee include:

“(a) Serving as the *chief executive of the board of the administration of the activities of referees and their staffs.*

“(b) Maintaining a continuous review of the decisions of referees from which no appeal is taken to uncover decisions which appear inconsistent with the law, with established judicial decisions, with prior decisions of the board or with each other and recommending such cases to the Appeals Board for certification to itself for a further hearing.” (Emphasis added.)

Section 404 provides as follows:

“The Appeals Board, or the executive officer *subject to its direction and control* to whom it delegates such responsibility, *shall appoint and direct the activities of one or more impartial referees* who shall hear and render a decision in every matter in which a petition is filed with, or an appeal is taken to, a referee as provided in this division. The compensation of the referees shall be fixed by the State Personnel Board at a rate comparable to that of other referees or hearing officers in state service whose duties and responsibilities are comparable, without regard to whether such other positions have membership in the State Bar of California as a prerequisite to appointment. No referee shall participate in any case in which he is an interested party.” (Emphasis added.)

Thus, with respect to referees specifically, the board may delegate to the Chief Administrative Law Judge its authority to appoint and direct such referees *subject to its direction and control*. The specific statutory designation of the Chief Administrative Law Judge, as executive officer, as the person to whom the board may delegate such responsibility precludes such delegation, either jointly or otherwise, to any other person, including the chairperson of the board or its Secretary-Chief Counsel. Moreover, the reservation to the board itself of the power of direction and control, expressly stated in section 404, is inherent in section 406, providing that the Chief Administrative Law Judge shall serve as the chief executive of the board in the administration of the activities of²

² Administration is necessarily included within the notion of direction and control. To

referees *and their staff*. in our view, therefore, the board may not delegate to anyone other than the Chief Administrative Law Judge its authority to appoint, direct, and control its referees and their staffs.

The first group of personnel consists of the boards own immediate staff and assistants, including those referees who are responsible for the writing of the board's own decisions on appeals from the district level. (*Cf.* § 1336.) This group, referred to in the subject proposal as the "higher authority" is administered and supervised by a Senior Administrative Law Judge. Pursuant to the provisions of section 403, the board may designate as its agent for purposes of appointment, direction, and control of such personnel, to exercise such power either jointly or severally, the chairperson of the board, the Senior Administrative Law Judge, or the Secretary-Chief Counsel of the board.

The second inquiry is whether a majority vote of the membership of the board constitutes an effective delegation of its authority to appoint, direct, and control the personnel of the board. Sections 12 of the Civil Code and 15 of the Code of Civil Procedure provide:

"Words giving a joint authority to three or more public officers or other persons are construed as giving such authority to a majority of them, unless it is otherwise expressed in the Act giving the authority."

Accordingly, since it is not otherwise provided in sections 403 or 404, the authority conferred upon the board, comprised of five members (§ 401), may be exercised by the majority which, for all practical purposes, becomes the full board. (*Ursino v. Superior Court* (1974) 39 Cal. App. 3d 611, 620; *Ford v. Civil Service Comm.* (1958) 161 Cal. App. 2d 692, 697; *People v. Hecht* (1895) 105 Cal. 621, 627; 28 Ops. Cal. Atty. Gen. 259 (1956); 28 Ops. Cal. Atty. Gen. 365 (1956).) Hence, the board's authority to appoint, direct, and control the personnel of the board may be effectively delegated by a majority of its membership. Once such authority has been effectively delegated, a member of the board as an individual retains no authority to participate in the appointment, direction and control of the personnel of the board except to the extent that such authority was delegated to such individual. Such an individual as a member of the board may participate in any further action of the board relating to such delegation.

administer means to manage the affairs of, or to direct or superintend the execution, use, or conduct of. (Webster's Third New Internat. Diet (1961) p. 27.)