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GEORGE DEUKMEJIAN
Attorney General

OPINION	:	No. 79-827
	:	
of	:	December 20, 1979
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GEORGE DEUKMEJIAN	:	
Attorney General	:	
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Anthony S. DaVigo	:	
Deputy Attorney General	:	
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SUBJECT: REVIEW OF CONFLICT OF INTEREST CODE—The provisions of California Constitution, article III, section 3.5 do apply to the decision of the Fair Political Practices Commission nor to review the Legislature’s Conflict of Interest Code and its amendments on the ground that such action would be unconstitutional.

The Honorable Tom K. Houston, Chairman, Fair Political Practices Commission, has requested an opinion on the questions which are restated as follows:

1. Do the provisions of California Constitution, article III, section 3.5 apply to the decision of the Fair Political Practices Commission, made prior to the adoption of said provisions, not to review the Legislature’s Conflict of Interest Code on the ground that such action would be unconstitutional?

2. Would the provisions of California Constitution, article III, section 3.5 apply to a decision of the Fair Political Practices Commission not to review amendments to the Legislature’s Conflict of Interest Code, enacted after the adoption of said provisions, on the ground that such action would be unconstitutional?

CONCLUSIONS

1. The provisions of California Constitution, article III, section 3.5 do apply to the decision of the Fair Political Practices Commission, made prior to the adoption of said provisions, not to review the Legislature's Conflict of Interest Code on the ground that such action would be unconstitutional.

2. The provisions of California Constitution, article III, section 3.5 would apply to a decision of the Fair Political Practices Commission not to review amendments to the Legislature's Conflict of Interest Code, enacted after the adoption of said provisions, on the ground that such action would be unconstitutional

ANALYSIS

Section 87300 of the Government Code¹ provides that every agency shall adopt and promulgate a Conflict of Interest Code. The term "agency" means any state agency or local government agency. (§ 82003.) Section 87303 provides that no Conflict of Interest Code shall be effective until it has been approved by the code reviewing body, which must approve, revise and approve as revised, or return a proposed Conflict of Interest Code to the agency for revision and resubmission. With respect to any state agency, the code reviewing body is the Fair Political Practices Commission. (§ 82011(a).) The term "state agency includes the Legislature. (§ 82049.) Thus, the commission is, under these statutes, compelled to exercise the power of review over the Legislature's Conflict of Interest Code.

In accordance with this statutory scheme, the Legislature adopted a Conflict of Interest Code. In 59 Ops. Cal. Atty. Gen. 509 (1976) this office concluded, however, that in view of the separation of powers doctrine the Legislature is not required to submit its Conflict of Interest Code to the commission for review and approval. Accordingly, the commission has not attempted to enforce the provisions of section 87303 with regard to the Legislature. (*Cf.* §§ 87304, 87305.)

On June 6, 1978, section 3.5 of article III of the California Constitution (hereinafter, "section 3.5"), known as Proposition 5 at the 1978 primary election, was adopted by the people. This amendment, proposed by Senate Constitutional Amendment number 25 (Stats. 1977, Resolution Chapter 48), provides as follows:

"An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:

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

“(a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;

“(b) To declare a statute unconstitutional;

“(c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.”

The first inquiry presented is whether section 3.5 applies to the decision of the commission, made prior to its adoption, not to review the Legislature’s Conflict of Interest Code on the ground that such action would be unconstitutional. Such action has never been determined by an appellate court to be unconstitutional.

The proscription of section 3.5, subdivision (a) extends not only to a declaration of unenforceability on constitutional grounds, but also to the refusal to enforce a statute on such grounds. We have no difficulty concluding at the outset that section 3.5 applies to the continued refusal by an administrative agency on constitutional grounds to enforce a statute even though the initial decision in the premises was made prior to its adoption. The question remains, however, whether the commission is an “administrative agency” within the meaning of section 3.5.

Section 3.5 does not define the term “administrative agency.” In common parlance, the term “administrative” pertains to the executive branch of government. (*Cf.* Webster’s New Internat. Dict. (3d ed. 1961) p. 28.) Thus, it has been stated that acts which are in furtherance of the execution of declared legislative policies and purposes or which are devolved upon a public agency by the organic law of its existence are deemed as acts of administration and classed among those governmental powers properly assigned to the executive department. (*Hubbs v. People ex rel. Department of Public Works* (1974) 36 Cal. App. 3d 1005, 1008–1009; *Hughes v. City of Lincoln* (1965) 232 Cal. App. 2d 741, 744–745; and see 61 Ops. Cal. Atty. Gen. 159, 180 (1978).)

In its stricter connotation, an “administrative agency” is a governmental body, other than a court or legislature, invested with power to prescribe rules or regulations or to adjudicate private rights and obligations. (2 Cal. Jur. 3d, Admin. law, § 2, pp. 219–220; 3 Davis, Administrative Law Treatise (1958), § 1.01, p. 1.)

We proceed to examine the statutory framework in which the decision of the Fair Political Practices Commission not to review the Legislature's Conflict of Interest Code was made. Section 83112 provides:

“The Commission may adopt, amend and rescind rules and regulations to carry out the purposes and provisions of this title, and to govern procedures of the Commission. These rules and regulations shall be adopted in accordance with the Administrative Procedure Act (Government Code, Title 2, Division 3, Part 1, Chapter 4.5, Sections 11371 *et seq.*) and shall be consistent with this title and other applicable law.”

Section 87311 provides in part that the review by the commission of proposed Conflict of Interest Codes shall be subject to the Administrative Procedure Act. Section 83116 provides:

“When the Commission determines there is probable cause for believing this title has been violated, it may hold a hearing to determine if such a violation has occurred. Notice shall be given and the hearing conducted in accordance with the Administrative Procedure Act (Government Code, Title 2, Division 3, Part 1, Chapter 5, Sections 11500 *et seq.*) The Commission shall have all the powers granted by that chapter.

“When the Commission determines on the basis of the hearing that a violation has occurred, it shall issue an order which may require the violator to:

“(a) Cease and desist violation of this title;

“(b) File any reports, statements or other documents or information required by this title;

“(c) Pay a monetary penalty of up to two thousand dollars (\$2,000) to the General Fund of the state.

“When the Commission determines that no violation has occurred, it shall publish a declaration so stating.”

Section 83118 provides:

“The Commission may subpoena witnesses, compel their attendance and testimony, administer oaths and affirmations, take evidence and require

by subpoena the production of any books, papers, records or other items material to the performance of the Commission's duties or exercise of its powers.

Judicial review of any action of the commission may be sought by any interested person. (§§ 83120, 87308.) In our view, the function of the commission with respect to the enforcement of the provisions relating to Conflict of Interest Codes falls well within either connotation of the term "administrative." Consequently, the commission is an "administrative agency" within the purview of section 3.5.

We next inquire whether the decision not to review the Legislature's Conflict of Interest Code is predicated on federal constitutional grounds. Since we conclude that it is not, we need not examine, and we express no opinion, as to the constitutional validity of section 3.5 under the Supremacy Clause of the federal Constitution. (U.S. Const., art. VI, § 2.)

As previously noted, the commission's decision was based upon the separation of powers doctrine set forth in article III, section 3 of the California Constitution:

"The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."

The issue presented is whether a violation of this provision would violate any provision of the federal Constitution. Article IV, section 4 of the Constitution of the United States provides in pertinent part that "[t]he United States shall guarantee to every State in this Union a republican form of government. . . ." After an exhaustive historical analysis, the Supreme Court of *Kansas in Vansickle v. Shanahan* (1973) 212 Kan. 426, 511 P.2d 223, 241, concluded that the doctrine of separation of powers is an inherent concept of a republican form of government:

"As indicated in the foregoing analysis of the debates of the federal convention, it was no accident that discussions of the republican form of government and of the expressed guaranty to the states were perfunctory in character. However, the Federalist Papers are replete with references to separation of power as a fundamental concept of a free government. In fact, one of the attacks made upon the proposed constitution as drafted by the federal convention was that it violated the doctrine of separation of powers which was considered intrinsic to a free republican government. The concept of a republican form of government and by implication the doctrine of separation of powers were the underlying assumption upon which the

framework of the new government was developed. In reaching this conclusion, this court holds that the doctrine of separation of powers is an inherent and integral element of the republican form of government, and separation of powers, as an element of the republican form of government, is expressly guaranteed to the states by Article IV, Section 4 of the Constitution of the United States.”

Upon similar analysis, however, the Supreme Court of Colorado in *In re Interrogatories Propounded by the Senate, etc.* (1975) 536 P.2d 308, 318 concluded that “. . . one would be hard pressed to conclude that the separation of powers doctrine and the concept of republicanism are inextricably united.”

Assuming that the separation of powers doctrine is inherent in a republican form of government, the statutory scheme in question would not violate the guaranty clause. Thus, the court in *Vansickle v. Shanahan, supra*, 511 P.2d at pp. 242–243 observed that the purpose of article IV, section 4 of the federal Constitution is to protect the people of the several states against aristocratic and monarchical innovations, and against insurrections and domestic violence, and to prevent them from abolishing a republican form of government; it does not proscribe any provision which does not accomplish these results. As noted by the Supreme Court of *Wisconsin in State v. Lebtola* (1972) 55 Wis. 2d 494, 198 N.W.2d 354, 356, unless a power transferred from one branch of the government to another branch is substantial or its retention essential to the separation of powers doctrine, there is no violation of the guaranty clause. Review by the commission of the Legislature’s Conflict of Interest Code, subject as of course to judicial review, does not abolish the representative nature of California government. Nor is the whole power of one department thereby exercised by the same hands which possess the whole power of another in such a fashion that the fundamental principles of a free constitution are subverted. (*Cf. Laisne v. California State Board of Optometry* (1942) 19 Cal. 2d 831; *Parker v. Riley* (1941) 18 Cal. 2d 83.)

Review by the commission of the Legislature’s Conflict of Interest Code would not violate any provision of the federal Constitution. The commission’s decision and refusal to undertake such review is based solely on state constitutional premises. It is concluded therefore that section 3.5 applies to the decision of the commission to refrain from such action.

The second inquiry pertains to any decision of the commission not to review amendments to the Legislature’s Conflict of Interest Code enacted after the adoption of section 3.5, on constitutional grounds. Review of such amendments is provided for under section 87306. For the reasons set forth in connection with the first inquiry, it is concluded that section 3.5 applies to any such decision or refusal to act. *****