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OPINION	:	No. 81-1102
of	:	JANUARY 26, 1982
GEORGE DEUKMEJIAN Attorney General	:	
Anthony S. Da Vigo Deputy Attorney General	:	

THE HONORABLE ROBERT D. CURIEL, COUNTY COUNSEL, COUNTY OF HUMBOLDT, has requested an opinion on the following question:

May a board of supervisors authorize the promotion and salary increase of a county employee to take effect retroactively to a date following initial discussion between the appointing authority and employee concerning an advancement and acknowledgment by the appointing authority that an advancement was warranted, where (a) it was mutually understood by the employee and appointing authority that any such advancement would be retroactive, but (b) the level of promotion and salary increase was left for further consideration, and remained undecided for at least six months prior to the eventual authorization of such promotion and salary increase by the board of supervisors?

CONCLUSION

A board of supervisors may not authorize the promotion and salary increase of a county employee to take effect retroactively under the specified circumstances.

ANALYSIS

We are advised with respect to the facts underlying the present inquiry as follows:

> "1. Although a regular county employee, the employee is a deputy county counsel working under the supervision of the county counsel, but hired under the appointing authority of the director of the county CETA Department and acts as its legal advisor.
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> "2. Shortly after he was employed, he discussed with the CETA director and with the county counsel a salary advance and promotion.
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> "3. Both these department heads acknowledged that such advancement and promotion were in order, but to what level and salary was left for further consideration. It was thought by the employee and by the appointing authority (the CETA director) that any promotion would be retroactive to the employee's anniversary date. Also, because of the unique situation of the employee under two department heads, the procedure to implement such advance and promotion was not entirely clear.
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> "4. During the next six months, the CETA Department experienced two changes in directors, and the county counsel likewise experienced two leadership changes. During this time, the employee's advancement remained undecided.
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> "5. Eventually, the board of supervisors promoted the employee and increased his salary prospectively. The board also authorized a retroactive promotion and salary increase if the Attorney General advises that a retroactive increase is legal. The proposed retroactive salary would become effective on the date which is subsequent to the date on which the attorney in question began salary discussions with the county counsel and the CETA director.
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> "6. The county salary resolution authorizes the county board of supervisors as follows:

"Upon a 4/5 vote, the Board of Supervisors may take any action concerning the employment and remuneration of County personnel deemed by the Board of Supervisors to be for the insurance of orderly and efficient operation of County government."

The inquiry presented is whether, under the circumstances related, the board of supervisors may authorize the promotion and salary increase to take effect retroactively, as indicated. Finding no lack of certitude as to the salary rate in effect prior to the authorization, we conclude on state constitutional grounds that it may not.

California Constitution, article XI, section 1, subdivision (b)[1] provides in pertinent part that "[t]he governing body [of a county] shall provide for the number, compensation, tenure, and appointment of employees."[2] Article IV, section 17, provides:

"The Legislature has no power to grant, or to authorize a city, county, or other public body to grant, extra compensation or extra allowance to a public officer, public employee, or contractor after service has been rendered or a contract has been entered into and performed in whole or in part, or to authorize the payment of a claim against the State or a city, county, or other public body under an agreement made without authority of law."

Article XI, section 10, subdivision (a), provides:

"A local government body may not grant extra compensation or extra allowance to a public officer, public employee, or contractor after service has been rendered or a contract has been entered into and performed in whole or in part, or pay a claim under an agreement made without authority of law."

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[1] The present inquiry concerns a general law county. With respect to charter counties, see article XI, section 4.

[2] In amplification of this grant of power, Government Code section 23003 provides:

"A county is a body corporate and politic, has the powers specified in this title, and such others necessarily implied from those expressed."

Government Code section 25207 provides:

"The board may do and perform all other acts and things required by law not enumerated in this part, or which are necessary to the full discharge of the duties of the legislative authority of the county government." (*San Joaquin County Employees' Assn., Inc.* v. *County of San Joaquin* (1974) 39 Cal.App.3d 83, 89.)

Thus, the constitution proscribes both the grant of extra compensation to a public employee after service has been rendered,[3] and the payment of a claim under an agreement made without authority of law. An agreement made without authority of the law in force at the time it is made is void. (*Pac. Inter-Club Yacht Assn.* v. *Richards* (1961) 192 Cal.App.2d 616, 619) and may not be ratified or validated by subsequent enactments. (Cf. *Los Angeles City Sch. Dist.* v. *Landier Inv. Co.* (1960) 177 Cal.App.2d 744, 755; 38 Ops.Cal.Atty.Gen. 143, 145 (1961).) Nor does estoppel lie. (*Pac. Inter-Club Yacht Assn.* v. *Richards*, *supra*, and see *Longshore* v. *County of Ventura* (1979) 25 Cal.3d 14, 28.) It is not suggested here, however, that payment is due by virtue of any agreement, nor, in any event, that the appointing power is authorized to enter into any binding agreement respecting salaries. (Cf. art. XI, § 1(b), *supra*; Gov. Code, §§ 3505, 3505.1.) Rather, the issue which is the focus of this analysis remains whether a retroactive extension of the salary increase would constitute "extra compensation" within the meaning of article XI, section 10(a).[4]

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[3] It may be reasonably inferred from the factual representations that the salary increase is an incident of promotion; not only did the indecision extend to the level of promotion as well as the amount of salary advancement, but both questions were resolved simultaneously. Were this the case, however, the salary increase would attend the performance of services at the promotional level, and the sole issue respecting the retroactive application of such increase would be whether a public employee may be compensated for services either not rendered, or performed without the benefit of a promotional appointment. The answer, that the statutorily prescribed method of appointment is an essential condition to the payment of salary, flows inexorably from the well established proposition that such salary is an incident of the position or office and not to its unauthorized occupation or exercise. (Cf. *San Francisco City etc. Employees Internat. Union* v. *City and County of San Francisco* (1975) 49 Cal.App.3d 272, 277; *Snow* v. *Board of Administration* (1978) 87 Cal.App.3d 484, 488; *Mierke* v. *Department of Water Resources* (1980) 107 Cal.App.3d 58, 60.) It will be *assumed*, therefore, in spite of apparent implications to the contrary, that the proposed retroactive extension of the salary increase is for services rendered in the lower class to which the employee was lawfully appointed.

[4] California Constitution, article XVI, section 6, provides that:

> "The Legislature shall have no power . . . to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever . . . ."

For purposes of this analysis, the gift clause, under the "public purpose" test, does not pose the critical problem. (Cf. *California Emp. etc. Com.* v. *Payne* (1947) 31 Cal.2d 210, 216; *Gordon H. Ball, Inc.* v. *State of California* ex rel. *Dept. Pub. Wks.* (1972) 26 Cal.App.3d 162, 170-171.) Nor does any other constitutional objection exist to the retroactive operation of a civil statute in the absence of any impairment of a vested right or obligation of contract. (*Id.*, at p. 168; cf. *Coast Bank* v. *Holmes* (1971) 19 Cal.App.3d 581, 593-597.)

In *San Joaquin County Employees' Assn., Inc.* v. *County of San Joaquin*, *supra*, 39 Cal.App.3d at page 88, the court stated in part:

> "On the issue of whether retroactive pay raises are unconstitutional per se, there is a paucity of case law but the subject has been the focal point of several Attorney General opinions. These opinions were not rendered as esoteric discussions of legal philosophies. Rather they were answers given to inquiring governmental agencies confronted with the day-to-day operation of government and are therefore to be given weight as being contemporaneous administrative interpretations. (*Mantzoros* v. *State Bd. of Equalization* (1948) 87 Cal.App.2d 140 [196 P.2d 657]; 3 Witkin, Summary of Cal. Law (7th ed. 1960) p. 1825.) These opinions (23 Ops.Cal.Atty.Gen. 271; 33, p. 143; 39, p. 200; 47, p. 61) hold that the granting of retroactive pay raises under the circumstances recited therein did not constitute a violation of either article XIII, section 25 (forbidding gifts of public funds) or article IV, section 17 (forbidding extra compensation for past services) of the California Constitution. The Attorney General opinions rely upon the fact that in each instance the adjusted salary rates were made retroactive to a date at which the salary rates were indefinite and subject to future determination."

(See also *Gai* v. *City Council* (1976) 63 Cal.App.3d 381, 390; *Goleta Educators Assn.* v. *Dall'Armi* (1977) 68 Cal.App.3d 830, 833.) In each of these cases the operative facts were that the salary levels of groups or classes of employees were uncertain or indefinite during the period of negotiation or settlement procedure. In *San Joaquin*, for example, the period of negotiation under the Meyers-Milias-Brown Act, Government Code section 3500 et seq., commenced or continued upon the expiration date of the existing salary ordinance. In *Gai*, a pay increase already negotiated by collective bargaining agreements remained subject to approval by the federal Construction Industry Stabilization Committee. In *Goleta Educators*, the compensation rates were, for all practical purposes, suspended for the duration of contract negotiations.

Finally, in *Jarvis* v. *Cory* (1980) 28 Cal.3d 562, the Supreme Court concluded that state employees' salary levels, although not then subject to any collective bargaining process, were a matter of legitimate, on-going dispute and uncertainty under the extraordinary circumstances[5] of fiscal year 1978-1979, and could therefore be retroactively adjusted without offense to the constitution. The court stated in part (*id.,* at pp. 570-572):

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[5] Such circumstances included the imposition of a state salary freeze in connection with the passage of Proposition 13, which the employees, who continually attempted to restore their cost of living increases, had good reason to treat as but the latest in a number of tentative salary

"Retroactive payments, however, are not necessarily 'extra compensation . . . after service has been rendered.' Where employees' salary levels are not fixed with certainty while the employees are working, the compensation they ultimately receive for their work cannot accurately be deemed 'extra compensation.' This principle is demonstrated by two cases in which retroactive payments were made to local employees who had rendered services while their salary levels were being negotiated.

". . . . . .

"Both the *San Joaquin* and *Goleta* courts may have been influenced by the employees' willingness to work at their prior salary rates during the period of uncertainty. More importantly, both courts recognized that if, while the employees are working, they justifiably contemplate the likelihood of future salary adjustments, they do not receive extra compensation when those adjustments are made. Furthermore, both cases illustrate that public employees need not have a legal expectancy or an enforceable claim to salary increases; it is enough that they are justifiably uncertain as to their precise salary level."

Did the employee who is the subject of this inquiry work during a period of uncertainty in justifiable contemplation of a future salary adjustment? Nothing in the facts provided suggest any lack of certitude as to the salary rate in effect during the on-going discussions. We are not advised that an existing salary ordinance or resolution had expired, that provisions of an existing contract had been suspended or terminated pending negotiations, or that an interim freeze compelled by the exigencies of uncommon occurrences had temporarily suspended on-going processes of resolution. Nor are we advised that any salary setting authority or agent was involved in any of the deliberations as to a salary increase for the period of negotiation. (Cf. 59 Ops.Cal.Atty.Gen. 166, 170 (1976).) In our view, a mere application, discussion, and favorable consideration, to amend retroactively an existing salary rate, ordinance, resolution, or contract which is both certain and definite will not operate of itself to render such existing salary uncertain or indefinite, nor would a contemplation of any such increase be justified where neither of the conferring parties is authorized to enter into a binding agreement.

While our conclusion is fully supported and expressly predicated upon the foregoing analysis, it must be further noted that the specific and literal terms of the constitution prohibit the payment of extra compensation to *a* public officer, employee, or

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adjustments which could be superseded as the unprecedented impact of the constitutional amendment was more fully evaluated.

contractor. (Cf. *Jarvis* v. *Cory*, *supra*, 28 Cal.3d 562, 577.) As previously discussed in 63 Ops.Cal.Atty.Gen. 634, 639-640 (1980), the constitutional bar against "extra compensation" was added to the California Constitution in 1879 as article IV, section 32, which was the substantive equivalent of article IV, section 17.[6] A dominant theme in the convention of 1879 was the distrust of legislative largesse to *individuals* making unauthorized claims.[7] In *Miller* v. *Dunn* (1887) 72 Cal. 462, for example, the California Supreme Court traced the reasons behind the addition of article IV, section 32 (now art. IV, 17) to the California Constitution of 1879:

> "There was a feeling, which had been long-suffering, that there should be some inhibition to prevent the legislature from allowing the payment of *extra compensation to officers who*, *subsequent to their election or appointment*, *discovered that the regular salary was insufficient*, and also to prevent relief bills in favor of those who had dealt with state and municipal officers, acting without express authorization from any source, or under palpably unauthorized and invalid contracts, and who were constantly asking the legislature to consider their misfortunes in pity, and regard them as deserving subjects of public benevolence. . . ." (Emphasis added.)

The intent of the gift and extra compensation prohibitions of the constitution is found in *Stevenson* v. *Colgan* (1891) 91 Cal. 649, 651, decided 12 years after the Convention of 1879:

> "Section 31 of article IV of the constitution provides that the legislature shall have no power 'to make any gift, or authorize the making of any gift, of any public money or thing of value to any individual,' and section 32 of the same article also declares: 'The legislature shall have no power to grant or authorize any county or municipal authority to grant any extra compensation or allowance to any public officer, agent, servant, or contractor, after service has been rendered or a contract has been entered into and performed in whole or in part.'
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> "By these provisions of the constitution, there is denied to the legislature the right to make *direct appropriations to individuals from general considerations of charity or gratitude*, *or because of some supposed oral obligation* resting upon the people of the state, and such as a just and generous man, although under no legal liability so to do, might be willing to

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[6] The section was shortened and renumbered in a 1966 constitutional revision measure which intended no substantive changes. (Voter's Pamphlet, General Election, Nov. 8, 1966.)

[7] Sargent, The California Constitutional Convention of 1878-9, 6 Cal.L.Rev. 1, 8-12.

> recognize in his dealings with others. It was because of abuses which had crept into legislation by reason of the unlimited power theretofore exercised by the legislature in determining what *individual claims* should be recognized by *private statute*, and to relieve in some degree legislators from the importunities of persons interested in securing such appropriations, that the power of the legislature was thus limited by the present constitution of this state." (Emphases added.)

We are unaware of any case in which an individual claim has been excepted from the constitutional constraints.

It is concluded that, under the circumstances related, the board of supervisors may not authorize a retroactive promotion and salary increase.

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