TO BE FILED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

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OPINION	:	No. 81-412
of	:	JULY 31, 1981
GEORGE DEUKMEJIAN Attorney General	:	
Clayton P. Roche Deputy Attorney General	:	

THE HONORABLE ARLO SMITH, DISTRICT ATTORNEY, CITY AND COUNTY OF SAN FRANCISCO, has requested an opinion on the following question:

May a district attorney require assistant district attorneys, who exercise the district attorney's discretionary powers, and who serve at the pleasure of the district attorney, to be residents of the county in which those powers are exercised?

CONCLUSION

By virtue of the provisions of article XI, section 10, subdivision (b) of the California Constitution, a district attorney may not require assistant district attorneys, who exercise the district attorney's discretionary powers, and who serve at the pleasure of the district attorney, to be residents of the county in which those powers are exercised.

ANALYSIS

Article XI, section 10, subdivision (b) of the California Constitution provides:

> "(b) A city or county, including any chartered city or chartered county, or public district, may not require that its employees be residents of such city, county, or district; except that such employees may be required to reside within a reasonable and specific distance of their place of employment or other designated location"

This provision was initially added to the Constitution by approval of the electorate at the November 5, 1974 general election as article XI, section 10.5. It was redesignated as subdivision (b) of section 10 at the June 8, 1976 primary election as one of a number of miscellaneous constitutional revisions for purposes of reorganization within the Constitution without substantive change. (Ballot Pamp., Proposed Amends, to Cal. Const. with arguments to voters, Primary Elec. (June 8, 1976) pp. 58–59, 64–69.)

The constitutional amendment, as added in 1974, followed in the wake of the decision of the California Supreme Court in *Ector* v. *City of Torrance* (1973) 10 Cal. 3d 129, wherein that court held that the provisions of section 50083 of the Government Code could not be constitutionally applied to charter cities because of the plenary authority over employees granted by the California Constitution to such cities. Section 50083 provided, and still provides:

> "No local agency or district shall require that its employees be residents of such local agency or district."

It was urged in *Ector* that "local agency" as defined in section 50001 of the Government Code included charter cities.

Shortly after the constitutional amendment relating to employee residence, this office in 59 Ops. Cal. Atty. Gen. 136 (1976) had occasion to review then article XI, section 10.5 with respect to a number of questions relating to the City of Alameda, a charter city. We concluded, inter alia, that the Alameda City Charter violated section 10.5 insofar as the charter required the appointive *officers* of the city, and their assistants and deputies (also designated as "officers" by the charter) to be residents of the city. Significantly, the appointive officers of the city upon which we rendered our opinion included the top officials of the city including the city manager, city attorney, and city clerk, who were appointed by the council and served at its pleasure, and the fire chief, police chief, health officer, city physician, city engineer, superintendent of streets, and the city planning

director, who were appointed by and served at the pleasure of the city manager.

In so concluding, we drew the line for purposes of then article XI, section 10.5, now section 10, subdivision (b), at *elective* officers. In short, we rejected any possible argument that the new constitutional provision intended a distinction between appointive "officers" and their deputies and assistants, and mere "employees."

With respect to *elective* officers we noted that traditionally such officers have been required to be residents of the city or other jurisdiction they serve. We further noted that elected officials are not generally considered to be "employees," nor do they meet the usual tests of an employment relationship where an employer has control over their daily activities, and may hire, fire or modify conditions of employment. Accordingly, we concluded article XI, section 10.5, did not encompass elective officers but did encompass all appointive officers who were employed by the city.[1]

With respect to appointive officers, we concluded that they were encompassed by then article XI, section 10.5, now section 10, subdivision (b), for a number of reasons. We noted that the term "employee" has no fixed meaning in all circumstances, and commonly means one who works for another for a salary or wages. We also noted that under the case law there are fine distinctions drawn between who is considered a "public officer" as opposed to a mere employee. Accordingly, we believed that article XI, section 10.5, now section 10, subdivision (b), would invite subterfuge if appointive officers were not included therein by leaving open the door for charter cities to designate mere employees to be officers. Furthermore, we noted that constitutional amendments are usually construed in their ordinary sense, and in the sense probably understood by the voters. We rejected the idea that the voters intended to draw the fine distinctions drawn by case law as to who is an officer and who is a mere employee. We concluded, that the voters intended that the term "employee," which was not defined in the proposition submitted to them, should mean what it does in ordinary parlance as above set forth, that is, one who works for another for a salary, wage or other compensation. We then finally stated:

> "In enacting the section in question the voters meant to restrict the right of chartered cities and counties, and public districts, to condition employment on residence, *and created as a single exception the right to*

[1]In general law cities, the elective officers are the city council, the city clerk and the city treasurer. (Gov. Code. § 36503.) The council may, however, submit to the voters a proposition as to whether to have all but the council appointive. (Gov. Code. § 36508.) Cities may also have an elective mayor (Gov. Code, §§ 34900–34906). With respect to charter cities, who are to be the officers of a city, and the manner in which they are to be elected or appointed, is a municipal affair and will be governed by charter or ordinance. (Cal. Const., art. XI, § 5.)

> *specify reasonable and specific distance requirements. If the voters had intended an exception for some types of employees it seems reasonable to conclude that they would have stated it*. It is long established law that exceptions to a general rule of a statute are to be strictly construed, and are not extended beyond their express terms. *People ex rel S.F. Bay etc. Com.* v. *Town of Emeryville*, 69 Cal. 2d 533, 543 (1968), and cases cited therein." (59 Ops. Cal. Atty. Gen. 136, 141.)

With this background, we now proceed to the question presented, that is, whether article XI, section 10, subdivision (b) is applicable to assistant district attorneys who are appointed by, serve at the pleasure of, and exercise the discretion of the district attorney, a clearly important elective officer of a county.[2] In short, we are asked whether an exception to the constitutional provision may be carved out as to the assistants and deputies of an important county elective officer despite the fact that we refused to carve out any exception for the assistants and deputies of important city officers. The requester suggests that such an exception may possibly be made for a number of reasons. Some of the suggested reasons are:

1. Assistant district attorneys exercise many of the important discretionary duties of the district attorney which are fundamental to the community relating to law enforcement and public safety such as the decision whether to charge a person with a crime, what charge should be made, and other crucial decisions such as taking pleas and dismissing charges or cases. Accordingly, it would follow that the assistant district attorney must have a personal interest or stake in the community.

2. Webster defines an employee as one employed by another, usually for wages or salary, and usually in a position below the executive level. The discretion reposed in assistant district attorneys leads to the conclusion they are executive officers. See also, Gov. Code, § 1001 declaring deputy attorneys general to be civil executive officers.

3. The legislative history supports the conclusion that article XI, section 10, subdivision (b) was not intended to be all encompassing because the prime movers behind the constitutional amendment were unions and civil service organizations and the principal thrust of the arguments to the voters was aimed at granting civil service employees certain rights.

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[2]By assistant district attorneys, the requester means all those he appoints who are deputies within the meaning of the law. (See Gov. Code. §§ 1190–1194, 24101.) We are also advised that in San Francisco the District Attorney has the authority to determine the qualifications of his assistants. We do not attempt to analyze the propriety of this practice under the Charter of the City and County of San Francisco.

4. Article XI, section 10, subdivision (b), which speaks only in terms of employees, follows in sequence subdivision (a) thereof which prohibits granting extra compensation for past services to a "public officer, public employee, or contractor," thus indicating that "officers" were not intended to be encompassed within subdivision (b).

An additional suggestion has been made by the League of California Cities that the legislative history of both sections 50083 of the Government Code and article XI, section 10, subdivision (b) was not intended to include "officers" in that both, as originally introduced in the Legislature, spoke in terms of "officers and employees." The term "officers" was deleted in subsequent versions of the legislation.[3] This suggestion would, as would suggestion 4, *supra*, of the requester, require a complete reversal of our opinion in 59 Ops. Cal. Atty. Gen. 136, *supra*, if accepted as controlling.

We have carefully considered the suggestions as to why (1) an assistant district attorney who serves at the pleasure of the district attorney should not be included within the provisions of article XI, section 10, subdivision (b), and (2) why appointive officers in general should not be so included. We reaffirm our conclusion in 59 Ops. Cal. Atty. Gen. 136, *supra*, that the line should be drawn between elective officials and appointive officers and employees, with the latter both to be considered "employees" within the constitutional provision. In reaffirming out prior opinion, we offer a few observations and amplifications of our conclusion in that opinion. We believe these observations and amplifications lead inexorably to the conclusion that the electorate never intended to draw the fine legal distinctions between who are public officers and who are mere employees which is to be found in the case law.

As to the office of the district attorney specifically, we note that the assistants and deputies may serve either at the pleasure of the appointing power, or may be "civil service employees" at the option of the county. (See Gov. Code, § 31100 *et seq*. (county civil service) and Gov. Code, § 45000 *et seq*. (city civil service), which may be made applicable to all appointive officers and employees.) Accordingly, should a distinction be made for purposes of residency requirements as between noncivil service assistants and deputies of a district attorney in one county, and civil service assistants and deputies in another county? If such a distinction is to be made, should it be made only as to assistants and deputies of *elected* officers, only "important" elected officers, or should it be made also as to "important" appointive officers? If one is to give credence to the suggestion that because of the important discretionary duties assistant district attorneys perform they should be residents, it would appear that some distinction would be required as between

[3]Letter to this office from the League of California Cities dated June 2, 1976.

assistants and deputies of "important officers" and assistants and deputies of other officers whose duties are less important to the community or which are primarily ministerial in nature such as those of a county clerk or a city clerk. Additionally, it is to be recalled that in counties which have no county counsel, the assistants to the district attorney must perform *civil* duties. Should a distinction be drawn between criminal assistants whose functions and duties must be, as asserted, responsive to the community, and civil deputies who do not perform the duties of charging criminals and deciding whether to dismiss charges against them? If no distinction is to be drawn between criminal and civil assistants, it would then follow that assistant and deputy county counsels (as well as assistant deputy city attorneys who perform similar duties) should also be exempt from the provision of article XI, section 10, subdivision (b). From the foregoing, it should be evident that the suggestion that assistant district attorneys who serve at the pleasure of the district attorney (that is, non civil service) are not encompassed within article XI, section 10, subdivision (b) raises infinitely more questions than it answers in the context of the constitutional provision. In short, we do not believe the voters meant to exclude certain appointive officers based upon whether they are civil service employees or whether they perform important functions. Nor do we find anything in either the language of the provision or the arguments to the voters which suggests such an approach.

With respect to the suggestion that Webster defines "employee" to usually exclude persons at the executive level, and that assistant district attorneys should be considered executive officers or "civil executive officers," we note the following. The Random House Unabridged Dictionary of the English Language (1966) defines employee merely as a person working for another person or a business firm for pay." It contains no qualification with respect to "executives." Thus, the "ordinary" meaning of the term "employee" may depend upon your lexicographer. Furthermore, Webster's Third New International Dictionary, Unabridged (1961) additionally defines employee as follows:

> "2: *in labor relations:* any worker who is under wages or salary to an employer and who is not excluded by agreement from consideration as a worker."

At least the working level assistant or deputy district attorneys would meet this definition in many counties. In fact, in very recent memory, assistant district attorneys were threatening "job actions," clearly not the role of "executives." Finally, insofar as it is urged that deputy and assistant district attorneys are civil executive officers within the meaning of, or by analogy to, section 1001 of the Government Code, we point out that virtually all local officers would appear to fit in that category. Section 1001 of the Government Code, after enumerating the *state* "civil executive officers" then adds to such category "such other officers as fill offices created by or under the authority of charters or laws for the

government of counties and cities or of the health, school, election, road or revenue laws," a rather all encompassing provision. Accordingly, those city officers considered in 59 Ops. Cal. Atty. Gen. 136, *supra*, whose positions were provided for in the city charter were as much civil executive officers as are a district attorney and his assistants and deputies. Thus, the position of district attorney is not distinguishable from the positions considered in that opinion on the grounds that he and his deputies and assistants are civil executive officers.

Insofar as it is urged that article XI, section 10, subdivision (b) was backed by employee unions and civil service organizations, and that the principal thrust of the arguments to the voters was to grant civil service employees rights, we make these observations. The constitutional provision was proposed by the Legislature as Assembly Constitutional Amendment No. 103 at the 1973–74 regular session. Accordingly, it had no official proponents other than the Legislature itself. Furthermore, we have reexamined the arguments to the voters in favor of Proposition 5 at the 1974 general election and fail to discern that its thrust was aimed only at civil service employees. As we read the arguments in favor of Proposition 5, its thrust was (1) to overrule the decision in *Ector* v. *City of Torrance*, *supra*, 10 Cal. 3d 129, (2) to assure cities the ability to recruit the most qualified employees free of political influence, (3) to permit employees to live where they are financially able to live and (4) to eliminate chronic understaffing problems due to residency requirements. (See Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 5, 1974) pp. 22–23.) Accordingly, its thrust can be said to have been to aid civil service employees only in the sense that it can be said that most public employees (including many appointive officers) now enjoy the protections afforded by civil service systems. Additionally, if one accepts as its purpose the desire to grant rights to civil service employees, then logically as to assistant district attorneys (and other appointive officers) one would have to distinguish between counties where such assistants (or other officers) serve at the pleasure of the district attorney (or other appointing power) and counties where they have civil service protection. However, nowhere either in the language of article XI, section 10, subdivision (b) or in its legislative history is such a distinction suggested. On the contrary, the purpose of the provision was clearly to have *the same rules* regarding residency applicable in all cities, counties and districts with respect to "employees."

We now reach the general suggestion raised by both the requester and the League of California Cities that had article XI, section 10, subdivision (b) meant to encompass appointive officers or employees, the language would have so read explicitly. We again return to our belief that the voters did not intend to make fine distinctions between salaried public employees who are also public officers in the legal sense and salaried public employees whose functions and duties do not rise to the dignity of making them public "officers." As an example of the fine distinctions drawn by the courts, we refer to the

collection of cases we have set forth in 57 Ops. Cal. Atty. Gen. 303, 305–306 (1974) wherein we had to determine whether the referee for a county board of supervisors held a public office, or held a mere employment. Out belief that the voters did not intend the constitutional provision to operate upon such fine distinctions is fortified to the point of virtually complete persuasion when we consider policemen and firemen in the context of the constitutional provision.

Police officers have traditionally been held to be *public officers* as distinguished from mere employees. (See *Logan* v. *Shields* (1923) 190 Cal. 661; *Estrada* v. *Indemnity Ins. Co.* (1958) 158 Cal. App. 2d 129.) Firemen may also be "officers" (compare *Humbert* v. *Castro Valley County Fire Protection Dist.* (1963) 214 Cal. App. 2d 1, 12–13, and *Jackson* v. *Wilde* (1921) 52 Cal. App. 259, 265–266, disapproved on other grounds in *Evans* v. *Los Angeles Ry. Corp.* (1932) 216 Cal. 495, 499, with *Mason* v. *City of Los Angeles* (1933) 130 Cal. App. 224.) Yet the arguments to the voters in favor of the adoption of article XI, section 10.5, and its prohibition of a residency requirement stated:

> ". . . A good *police officer*, planner, *fireman*, engineer, paramedic, environmental standards supervisor or sanitation worker is hard to find even under the most favorable conditions-bodies yes; but qualified persons, no. Citizens of these communities deserve more than mere job occupants, they deserve quality employees. . . ." (See Ballot Pamp. Proposed Amends, to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 5, 1974) p. 22, emphases added.)

Likewise, communities deserve the best qualified attorneys to serve in various legal positions, whether it be in a district attorney's office, a county counsel's office, a public defender's office, or a city attorney's office.

Accordingly, it is our conclusion that 59 Ops. Cal. Atty. Gen. 136, *supra*, is a proper interpretation of article XI, section 10, subdivision (b) of the California Constitution and that it properly draws the line between elective officers and other officers and employees. It is thus also our conclusion that article XI, section 10, subdivision (b) was not intended to distinguish between appointive officers based upon the importance of their duties to the community they serve. Nor was it intended to distinguish between officers based upon whether they serve at the pleasure of their appointing power, such as an individual elective officer, or whether they are part of classified service and hence are "civil service employees" with civil service protection.

It follows, then, that a district attorney may not require assistant or deputy district attorneys, who exercises his discretionary powers, and who serve at his pleasure,

to be residents of the county in which those powers are exercised. In so concluding we note that those opposed to the adoption of article XI, section 10, subdivision (b) stated inter alia in the ballot arguments cited above (at p. 23) that "[w]e believe that public employees should be fully familiar with, and sympathetic to, the social, economic and cultural problems of the city by which they are employed." This in essence is the argument in favor of requiring assistant district attorneys to be residents of the county. The voters, however, apparently did not believe that it was necessary for employees of a local agency to reside therein in order to be concerned about its problems.

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