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OFFICE OF THE ATTORNEY GENERAL
State of California

GEORGE DEUKMEJIAN
Attorney General

OPINION

of

GEORGE DEUKMEJIAN
Attorney General

John T. Murphy
Deputy Attorney General

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THE HONORABLE E. C. FULLERTON, DIRECTOR OF THE
DEPARTMENT OF FISH AND GAME, has requested an opinion on the following
questions:

1. May the Director of the Department of Fish and Game limit the law
enforcement actions of a member of the Wildlife Protection Branch to fish and game law
violations?
2. Would a member of the Wildlife Protection Branch violate Penal
Code section 142 by restricting his law enforcement actions to fish and game law
violations?

CONCLUSION

1. The Director of the Department of Fish and Game may, in
implementing policies, in making staff assignments and in exercising supervision,

concentrate the law enforcement actions of members of the Wildlife Protection Branch for the enforcement of fish and game laws since that is the primary duty of Branch members. However, he may not confine their peace officer status to this function as the Legislature has conferred broader law enforcement authority upon Branch members.

2. A member of the Wildlife Branch would violate Penal Code section 142 by willfully refusing to receive or arrest a person charged with a criminal offense.

ANALYSIS

Under Penal Code section 830.2¹ members of the Wildlife Protection Branch of the Department of Fish and Game (hereafter referred to as Branch members) are “peace officers whose authority extends to any place in the state.” Section 830.2(g) identifies these peace officers as follows;

“Members of the Wildlife Protection Branch of the Department of Fish and Game, provided that the *primary duty* of such deputies shall be the enforcement of the law as set forth in Section 856 of the Fish and Game Code.” (Emphasis added.)

Unless otherwise clearly intended or indicated, statutes should be construed in accordance with the common or ordinary meaning of the language used. (*People v. Heffner* (1977) 70 Cal. App. 3d 643, 648; *Standard Oil Co. v. State Board of Equalization* (1974) 39 Cal. App. 3d 765, 768.) “Primary duty” refers to a duty “first or highest in rank or importance.” (The Random House Dictionary of the English Language, 1966 edition, p. 1142.) The term should be contrasted with the term “exclusive duty,” which means a duty “shutting out all others.” (*Id.* at 497.) The Legislature, in reference to fish and game law enforcement officers, repeatedly has made distinctions between a, “primary duty” and an “exclusive duty.”

Former section 830.3, as it appeared before amendment in 1974 (Stats. 1972, ch. 1377, p. 2832, § 71), listed in subdivision (e) fish and game law enforcement officers as peace officers:

“Members of the Wildlife Protection Branch of the Department of Fish and Game deputized pursuant to Section 856 of the Fish and Game Code, deputies appointed pursuant to Section 851 of such code, and county

¹Unless otherwise indicated, all statutory references are to the Penal Code.

fish and game wardens appointed pursuant to Section 875 of such code are peace officers; provided, that the *primary duty* of deputized members of the Wildlife Protection Branch, and the *exclusive duty*, except as provided in Section 1509.7 of the Military and Veterans Code, of any other peace officer listed in this subdivision, shall be the enforcement of the provisions of the Fish and Game Code, as such duties are set forth in Sections 856, 851 and 878, respectively, of such code.” (Emphasis added.)

Section 830.3 also then contained subdivision (q) which was a limitation upon the powers of such peace officers identified in subdivision (e):

“(q) The authority of any peace officer listed in subdivisions (c) through (p), inclusive, extends to any place in the state; provided, that except as otherwise provided in this section, Section 830.6, or Section 1509.7 of the Military and Veterans Code, *any such peace officer shall be deemed a peace officer only for purposes of his primary duty, and shall not act as a peace officer in enforcing any other law except:*

(1) When in pursuit of any offender or suspected offender; or

(2) To make arrests for crimes committed, or which there is probable cause to believe have been committed, in his presence while he is in the course of his employment; or

(3) When, while in uniform, such officer is requested, as a peace officer, to render such assistance as is appropriate under the circumstances to the person making such request, or to act upon his complaint, in the event that no peace officer otherwise authorized to act in such circumstances is apparently and immediately available and capable of rendering such assistance or taking such action” (Emphasis added.)

Thus, the Legislature set out specific additions to the “primary duty” of the officers to enforce fish and game laws, and these additions concerned criminal offenses generally. The Legislature did not intend that a “primary duty” be tantamount to an “exclusive duty.”

By the 1974 amendment to Section 830.3 (Stats. 1974, ch. 639, p. 1494, § 2) fish and game law enforcement officers were more clearly divided into two categories of peace officers:

“(e) (1) Members of the Wildlife Protection Branch of the Department of Fish and Game deputized pursuant to, and meeting the requirements of, Section 856 of the Fish and Game Code are peace officers. *The authority of any such peace officers extends to any place in the state as to a public offense committed or which there is probable cause to believe has been committed within the state.*

(2) Other deputies of the Department of Fish and Game deputized pursuant to Section 851 of the Fish and Game Code, and county fish and game wardens deputized pursuant to Section 875 of such code, are peace officers, provided that the *exclusive duty* of such deputies or county fish and game wardens shall be the enforcement of the provisions of the Fish and Game Code and the regulations made pursuant thereto.” (Emphases added.)

The first category, consisting of Branch members, was given plenary peace officer authority; the second category, those deputized under Fish and Game Code sections 851 and 875, were restricted to the “exclusive duty” of enforcing the Fish and Game Code and regulations made pursuant to it. This latter category was also restricted by subdivision (p) of 830.3, which essentially incorporated the limitations of powers language previously set out in subdivision (q).

A further amendment in 1974 (Stats. 1974, ch. 1403, p. 3072, § 12) substituted the following description in section 830.3:

“(e) Members of the Wildlife Protection Branch of the Department of Fish and Game deputized pursuant to Section 856 of the Fish and Game Code, deputies appointed pursuant to Section 851 of such code, and county fish and game wardens appointed pursuant to Section 875 of such code are peace officers; provided, that the *primary duty* of deputized members of the Wildlife Protection Branch, and the *exclusive duty*, except as provided in Section 8597 of the Government Code, of any other peace officer listed in this subdivision, shall be the enforcement of the provisions of the Fish and Game Code, as such duties are set forth in Sections 856, 851 and 878, respectively, of such code.” (Emphases added.)

Accordingly, Branch members again had the enforcement of the fish and game laws as a “primary duty” and the other persons deputized by the Department had this same responsibility as an “exclusive duty.” Nevertheless, under subdivision (p) Branch members were peace officers only for purposes of their “primary duty” except as otherwise provided in that subdivision.

In 1976, section 830.3 returned to the 1974 design (Stats. 1974, ch. 639, p. 1494, § 2) with subdivision (e)(1) covering Branch members and subdivision (e)(2) covering other Department deputies (Stats. 1976, ch. 42, p. 72, § 1; Stats. 1976, ch. 1435, p. 6329, § 3). Again the authority of Branch members was extended “to any place in the state as to a public offense committed or which there is probable cause to believe has been committed within the state.” By subsequent amendments, subdivisions (e)(1) and (e)(2) became (d)(1) and (d)(2) and subdivision (p) became subdivision (q).

In 62 Ops. Cal. Atty. Gen. 626, 629 (1979), we determined that Branch members had plenary peace officer authority regardless of the apparent limiting language of subdivision (q).

“As originally enacted by chapter 1222, statutes of 1968, then subdivision (e) of section 830.3 provided that Branch Members had the ‘primary duty’ of the enforcement of the provisions of the Fish and Game Code. The proviso setting forth the primary duty of Branch Members was deleted by chapter 42, statutes of 1976, which amended subdivision (e) to read as subdivision (d) now provides. The 1976 deletion of the language making enforcement of the Fish and Game Code the primary duty of Branch Members, and the enactment of the same language granting plenary peace officer authority as was used in subdivision (a) for Department of Justice agents, is a clear indication that the Legislature intended to terminate the subdivision (q) limitations with respect to Branch Members. We conclude that the peace officer authority of Branch Members, which extends to any place in the state as to a public offense committed or which there is probable cause to believe has been committed within the state, is limited by the training requirements of Fish and Game Code section 856, but is not limited by the restrictions set forth in subdivision (q) of section 830.3.”

Consequently, we further concluded that a Branch member might exercise his authority as a peace officer while off duty and out of uniform, with one exception not relevant to the present discussion.² (62 Ops. Cal. Atty. Gen. at 629–631.)

The peace officer status of Branch members is now set forth in section 830.2. In a major restructuring of the peace officer statutes in 1980 (Stats. 1980, ch. 1340, p. 4721, § 6), Branch members were removed from section 830.3 and placed in section 830.2, as peace officers, along with members of the California Highway Patrol, the California State Police Division, the California National Guard, the University of California Police

²See *People v. Corey* (1978) 21 Cal. 3d 738.

Department, the Law Enforcement Liaison Unit of the Department of Corrections and the Department of Parks and Recreation.

Unlike former section 830.3, section 830.2 contains no limitations of powers provision. Indeed, the language of old subdivision (q) has been eliminated from the statutes.

The present statutory scheme in chapter 4.5 of title 3, part 2 of the Penal Code gives the broad peace officer authority to those identified in section 830.1, namely, sheriffs, policemen, marshals and constables, district attorneys' investigators, state agents and others. The significant difference between section 830.1 and section 830.2 is that in the latter statute the Legislature has spelled out a "primary duty" for the categories of peace officers listed therein. We believe that the Legislature, by identifying a "primary duty," did not intend to confine the peace officer authority of those persons listed in section 830.2 but intended only to specify their paramount duty. If the Legislature had intended otherwise, it could have used the term "exclusive duty" rather than the term "primary duty" or limited Branch members' peace officer authority to times when they were engaged in the performance of their fish and game duties. Indeed, in section 830.6(a)(1), a person appointed as a deputy of the Department of Fish and Game, as distinguished from a Branch member, is assigned specific police functions and has peace officer status only for the duration of the assignment:

"Whenever any qualified person is deputized or appointed by the proper authority as a reserve or auxiliary sheriff or city policeman, a deputy sheriff, a reserve police officer of a regional park district, or a deputy of the Department of Fish and Game, and is assigned specific police functions by such authority, such person is a peace officer; provided, such person qualifies as set forth in Section 832.6, and provided further, that the authority of such person as a peace officer shall extend only for the duration of such specific assignment." (Emphasis added.)

In companion statutes the Legislature has restricted the authority of peace officers where it wished to do so. For example, in current sections 830.3 and 830.31 the following language is used:

"The following persons are peace officers whose authority extends to any place in the state for the purpose of performing their primary duty or when making an arrest pursuant to Section 836 of the Penal Code as to any public offense with respect to which there is immediate danger to person or property, or of the escape of the perpetrator of such offense, or pursuant to

Section 8597 or Section 8598 of the Government Code.”

Since the Legislature has not circumscribed the peace officer status of Branch members to an exclusive responsibility to enforce the fish and game laws, we conclude that the Director cannot confine their actions to such duty or eliminate the peace officer responsibilities given to them by statutes other than fish and game laws. This determination is reinforced by Fish and Game Code section 856(a) which provides:

“All members of the Wildlife Protection Branch designated by the director as deputized law enforcement officers are peace officers. *The authority of any such peace officer extends to any place in the state as to a public offense committed or which there is probable cause to believe has been committed within the state.*” (Emphasis added.)

Our conclusion does not mean that the Director cannot control or restrict the law enforcement actions of Branch members during the course of their employment. The Legislature has stated, in section 830.2, that the “primary duty” of these deputies is the enforcement of the law as set forth in Fish and Game Code section 856 and, as we have seen, that duty is first or highest in rank or importance. The Department is administered through the Director, and Fish and Game Code section 704 provides:

“The director shall be the appointing power of all employees within the department, and all employees in the department shall be responsible to him for the proper carrying out of the duties and responsibilities of their respective positions.”

The Director has discretion to determine the employment priorities for Branch members and hold them responsible for fulfilling them vis-a-vis whatever separate peace officer duties may arise during or outside the course of employment.

Though we conclude that a Branch member has peace officer authority which extends beyond his or her primary duty, we do not find that a Branch member may relegate that primary duty to a secondary position. The Legislature has in chapter 4.5 of title 3, part 2 to the Penal Code created several classes of peace officers. Within section 830.2 the primary duty of each sub-class is spelled out.³ This design indicates a legislative intent that each class of peace officer enforces the laws within the ambit of its particular employment

³In Section 830.2(c) a “primary duty” is not expressly designated for the California National Guard. Members of the Guard are afforded peace officer status only when in active service and while assisting civil authorities in an area requiring military assistance.

and that any other law enforcement actions would be the exception rather than the rule. To determine otherwise would result in the absurd conclusion that peace officers can pick and choose the set of laws they wish to enforce regardless of their employment. Indeed, certain fields of law enforcement require special training not universally available or special qualifications not universally possessed. Generally speaking and under normal conditions, Highway Patrol members should not be searching for poachers and Branch members should not be patrolling highways. The Director, then, may limit the action of Branch members by his authority to implement policies, to make assignments to his staff and to exercise supervision over his employees. His powers are derived from the Fish and Game Commission which, in turn, has the responsibility under the California Constitution for "the protection and propagation of fish and game as the Legislature sees fit." (California Constitution, art. 4, § 20(b).) The Director need not assign duties to Branch members except those necessary to enforce the Fish and Game Code and regulations promulgated thereunder. Branch members who depart from their assigned duties without justification would be subject to administrative discipline.

If during the course of employment a Branch member were confronted with a situation in which he had a mandatory duty to act as a peace officer, and this situation required him to act outside the scope of his primary duty, a Branch member would be justified in taking the required action. However, absent authorization from the Director, a Branch member should not seek out such situations and cross over into areas of law enforcement which are the primary responsibilities of other classes of peace officers. Many peace officer duties are discretionary rather than mandatory, such as the authority to make a warrantless arrest. (*Michenfelder v. City of Torrance* (1972) 28 Cal. App. 3d 202, 207.) We believe that the Director may hold Branch members accountable for their conduct if they elect to take discretionary law enforcement actions outside the scope of the primary duty and at the expense of that primary duty. Where a statute merely authorizes a peace officer to act without imposing a mandatory duty to act, the Director may discipline the officer for exercising such authority during working hours in a manner which interferes with the performance of assigned duties.

The Legislature, in Penal Code section 142, has assigned to peace officers the duty to receive or arrest a person charged with a criminal offense. Penal Code section 142 provides:

"(a) Any peace officer who has the authority to receive or arrest a person charged with a criminal offense and willfully refuses to receive or arrest such person shall be punished by a fine not exceeding five thousand dollars (\$5,000), or by imprisonment in the state prison, or in a county jail not exceeding one year, or by both such fine and imprisonment.

“(b) Notwithstanding subdivision (a), the sheriff may determine whether any jail, institution, or facility under his direction shall be designated as a reception, holding, or confinement facility, or shall be used for several of such purposes, and may designate the class of prisoners for which such facility shall be used.”

The statute does not differentiate among classes of peace officers. “Any peace officer” would indicate a peace officer selected without restriction or limitation of choice. (See *Emmolo v. Southern Pacific Co.* (1949) 91 Cal. App. 2d 87, 92; 62 Ops. Cal. Atty. Gen. 394, 395–396.) Branch members, as peace officers, come within the purview of this statute.

At the outset, section 142 should be placed in its context within the Penal Code. Under section 837, a private person may make arrests in situations specified in that section. For example, a private person while fishing may observe another fisherman catching a number of fish in excess of the legal limit and may arrest that person for “a public offense committed or attempted in his presence.” Having made the arrest, the private person must, under section 847, without unnecessary delay, take the arrested person before a magistrate or deliver him to a peace officer.

Section 847 provides:

“A private person who has arrested another for the commission of a public offense must, without unnecessary delay, take the person arrested before a magistrate, or deliver him to a peace officer. There shall be no civil liability on the part of and no cause of action shall rise against any peace officer, acting within the scope of his authority, for false arrest or false imprisonment arising out of any arrest when:

(a) Such arrest was lawful or when such peace officer, at the time of such arrest had reasonable cause to believe such arrest was lawful; or

(b) When such arrest was made pursuant to a charge made, upon reasonable cause, of the commission of a felony by the person to be arrested; or

(c) When such arrest was made pursuant to the requirements of Penal Code Sections 142, 838 or 839.”

Section 142 fits into the scheme by mandating that the peace officer accept custody of the arrested person. (*Kinney v. County of Contra Costa* (1970) 8 Cal. App. 3d 761, 767–768) Of course, we do not perceive this section as relating only to persons arrested for or charged with fish and game law violations. The Branch member must receive or arrest a person charged with other criminal offenses as well.⁴

We do not interpret section 142 as requiring a peace officer to arrest every person he believes he has grounds to arrest. Section 142 refers to “a person charged with a criminal offense.” As used in the criminal law, a person is charged by formal complaint, information or indictment. (*People v. Lepri* (1917) 35 Cal. App. 2d 60, 62; see also *People v. Redmond* (1966) 246 Cal. App. 2d 852, 861.) Consequently, section 142 prohibits a peace officer from willfully refusing to arrest a person already formally charged with a crime.

Other provisions of law place enforcement duties upon peace officers generally. For example, Business and Professions Code section 25619 requires all peace officers to enforce the alcoholic beverage control laws; Health and Safety Code section 4477 directs all officers to enforce the garbage control laws. Such laws, while distinct from the fish and game laws, are not always irrelevant to the wildlife protection duties of Branch members.⁵ However, the enforcement of other laws should not take precedence over the primary duty of Branch members. In view of the general peace officer authority of Branch members accorded them by the Legislature, it is our opinion that their law enforcement activities cannot be confined totally to fish and game violations.

Accordingly, we conclude that the “primary duty” of Branch members is the enforcement of the Fish and Game Code and that the Director must employ Branch members in a manner designated to carry out this responsibility. However, the Director cannot remove from Branch members other responsibilities they have as peace officers by reason of Penal Code section 142 and other statutes.

⁴A peace officer who receives a person who was arrested without a warrant may, under the conditions set out in section 849, release that person. (See 52 Ops. Cal. Atty. Gen. 65 (1969).) If the arrest is for a misdemeanor and the arrester does not demand to be taken before a magistrate, the citation process under section 853.6 may be used.

⁵The enforcement of fish and game laws is not restricted to employees of the Department. Indeed, Fish and Game Code section 10508 requires all peace officers of the county in which a fish or game refuge is located to enforce the laws relating to that refuge.