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OPINION	:	No. 81-801
of	:	JANUARY 29, 1982
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THE HONORABLE ADRIAN KUYPER, COUNTY COUNSEL FOR THE COUNTY OF ORANGE, has requested opinions on three questions we have rephrased as follows:

1. Does the 1980 amendment to Penal Code section 830.5 disqualify a person with a felony conviction from holding a job that requires having custody of wards in an institution operated by the probation department in a general law county?

2. Would such disqualification apply to employees working in such positions before the effective date of the amendment?

3. Would relief granted under Penal Code section 1203.4 remove such disqualification?

CONCLUSIONS

1. The 1980 amendment to Penal Code section 830.5 disqualifies a person with a felony conviction from holding a job that requires having custody of wards in an institution operated by the probation department in a general law county.

2. Such disqualification applies to employees working in such positions before the effective date of the amendment.

3. Relief granted under Penal Code section 1203.4 would not remove such disqualification.

ANALYSIS

Penal Code section 830.5, as amended in 1980 (Stats. 1980, ch. 1340, eff. 9/30/80), states in relevant part:

> "The following persons are peace officers . . . : [A]ny . . . employee having custody of wards in any institution operated by a probation department."

Government Code section 1029 states in relevant part:

> "(a) Except as provided in subdivision (b), [1] *any person who has been convicted of a felony* in this state or any other state, or who has been convicted of any offense in any other state which would have been a felony if committed in this state, *is disqualified from* holding office or *being employed as a peace officer of the* state, *county*, city, city and county or other political subdivision, whether with or without compensation, *and is disqualified from any* office or *employment by* the state, *county*, city, city and county or other political subdivision, whether with or without compensation, *which confers upon the holder or employee the powers and duties of a peace officer*."

In *Hetherington* v. *State Personnel Bd.* (1978) 82 Cal.App.3d 582 the constitutionality of section 1029 was upheld against contentions that it violated plaintiff's equal protection and due process rights. The court found that the disqualification was a reasonable means to assure the character of peace officers and to avoid the appearance that

[1] Subsection (b) permits the Department of Corrections and the Department of the Youth Authority to hire as parole agents ex-felons who have received full and unconditional pardons.

peace officers may be untrustworthy. The court found that this disqualification was reasonable even when applied to those peace officer positions largely limited to the counseling and supervision of youthful offenders. Public confidence in "parole officers, prison guards, probation officers, parole agents, youth counselors, group supervisors or any of the other employees the Legislature has seen fit to designate as 'peace officers' could be seriously weakened if ex-felons were hired." (*Id.*, at p. 591.)

Although not discussed in *Hetherington*, it is also clear that disqualification from a peace officer position, even when applied to a person whose felony was committed before establishment of the disqualification, does not increase the punishment for the felony and thereby act as an unconstitutional ex post facto law. "'A statute intended to protect the public is not *ex post facto* even though disqualifying a person, for past acts or omissions, from continuing his profession or business or continuing to own concealable firearms.' (16 C.J.S. 900.)" (*Ellis* v. *Dept. of Motor Vehicles* (1942) 51 Cal.App.2d 753.)

The combined effect of Penal Code section 830.5 and Government Code section 1029 is clear. Penal Code section 830.5 as amended in 1980 makes an employee in an institution run by a probation department who is required to have custody of wards a peace officer. Government Code section 1029 disqualifies any person who has been convicted of a felony from employment in a position having peace officer powers and duties. Therefore, Penal Code section 830.5 disqualifies an ex-felon from holding a job that requires having custody of wards in an institution operated by the probation department in a general law county.

The second question we have been asked to address concerns the applicability of the Government Code section 1029 disqualification to persons who were employed in the affected institutional positions prior to the 1980 amendment to Penal Code section 830.5.

We first note that neither Penal Code section 830.5 nor Government Code section 1029 contains any exceptions for persons already employed in the positions newly designated as peace officer positions that would either exempt their positions from the peace officer designation or exempt them from the qualification requirements of section 1029. Had the Legislature intended to exempt any of the newly created peace officer positions from the disqualification of section 1029 they could have done so specifically as was done in Welfare and Institutions Code section 1772 which provides in relevant part:

> "Every person honorably discharged from control by the Youthful Offender Parole Board who has not, during the period of control by the authority been placed by the authority in a state prison shall thereafter be released from all penalties and disabilities resulting from the offense or crime

> for which he or she was committed, and every person discharged may petition the court which committed him or her, and the court may upon such petition set aside the verdict of guilty and dismiss the accusation or information against the petitioner who shall thereafter be released from all penalties and disabilities resulting from the offense or crime for which he or she was committed, including, but not limited to, any disqualification for any employment or occupational license, or both, created by any other provision of law. However, such a person shall not be eligible for appointment as a peace officer employed by any public agency, other than the Department of Youth Authority, if his or her appointment would otherwise be prohibited by Section 1029 of the Government Code."

Not only has the Legislature failed to provide for an exception for incumbent employees but the courts have not found any contractual, statutory or constitutional mandate for such an exception.

> "[I]nsofar as duration of such [public] employment is concerned, no employee has a vested contractual right to continue in employment beyond the time or contrary to the terms and conditions fixed by law." (*Miller* v. *State of Calif.* (1977) 18 Cal.3d 808, 813.)

The *Miller* court upheld the application of a reduced mandatory retirement age (to 67 from 70) to employees already in state civil service positions at the time of the change. This application meant that employees who were 67, 68 or 69 at the time the change took effect were required to retire immediately. The court found "no constitutionally protected right to remain in employment . . . ."

In a case involving similar facts (a reduction of the maximum age of retirement for certain county employees) the court found that the application of mandatory retirement ages even to persons capable of continued job performance was not arbitrary, discriminatory or unreasonable as it served the public purpose of increasing "the opportunity for all qualified persons to share in public employment and . . . [permitting] government units to plan for orderly attrition through lower retirement ages . . . ." (*Townsend* v. *City of Los Angeles* (1975) 49 Cal.App.3d 263.)

Accordingly, we concluded in an unpublished opinion dated December 7, 1977 (I.L. 77-167) that the Department of the California Highway Patrol could impose a new job-related standard for physical condition on incumbent officers as such a standard is one of the terms and conditions of employment and therefore subject to change. Such a change could be reasonably adopted to improve the efficiency of the service and limit the

losses of manpower and funds through injuries resulting from inadequate physical condition.

The court in *Hetherington* v. *State Personnel Bd.*, *supra*, 82 Cal.App.3d 582 in response to the contention that the section 1029 disqualification violated due process of law when applied to positions involving counseling and rehabilitation of youthful offenders stated:

> "It is true in general that a person cannot be removed from or denied government employment because of factors totally unconnected with the responsibilities of that employment. [Citations.] In like vein, some federal cases have held that there must be some reasonably foreseeable specific connection between the disqualifying quality or conduct of an individual and the efficiency of the public service. [Citations.] But we are not dealing here with a disqualifying factor unconnected with the responsibilities of the prospective employment or the efficiency of the public service. We have pointed out sufficiently above that there is a reasonably foreseeable specific connection between the status of being an ex-felon and the responsibilities connected with, and efficiency necessary to, the status or position of a peace officer, as defined by the Legislature. [Citations.]
>
> "Plaintiffs contend due process is violated by section 1029 since it assertedly presumes facts which are not universally true, i.e., 'unfitness' to hold a peace officer position, and the state has alternative means to determine the truth of the presumption. This contention is meritless.
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> "Plaintiffs rely on a line of decisions holding under certain circumstances that a conclusive presumption violates due process if (a) the presumed facts are not universally true; (b) reasonable alternative means exist to determine actual facts; and (c) the presumption affects an important right or one enjoying constitutionally protected status. [Citations.]
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> "As we have indicated above, the 'presumption', if such it be considered, in Government Code section 1029, by dis- qualifying an ex-felon from holding a government position as a peace officer does not affect any *right* at all. It merely affects a privilege of governmental employment which may be withheld where, as here, there is no arbitrary classification involved in the qualifications, such as would violate the equal protection clauses of the United States or California Constitutions. [Citations.]

"Moreover, it must be emphasized that the statute is not pointed solely at unfitness or competence in the sense of being capable or able to do the job, but it is pointed at, and molded by, consideration of other factors. These include such things, implicit in the nature of the subject matter of the legislation, as public faith and confidence in peace officers, morale amongst the ranks of peace officers, problems of ex-felons carrying firearms, and the like.

"We find no violation of due process of law in Government Code section 1029, either on its face or as applied in this case." (*Id.*, at p. 592.)

The *Hetherington* court also held that the "determination of what governmental positions, other than police as such, are to be categorized as peace officers, is a legislative matter. The inclusion of various public occupations, assuming reasonableness or rationality, is a policy matter to be pursued through legislative channels." (*Id.*, at p. 591.)

In light of the failure of the Legislature to provide any exceptions for ex-felons employed in institutions prior to the 1980 amendment to Penal Code section 830.5 and the lack of any constitutional mandate for such an exception, we must conclude that any ex-felons employed in jobs in which they have custody of wards in a probation department institution became disqualified for such jobs on September 30, 1980, when the amendment took effect.

The third issue we have been asked to resolve is whether relief granted under Penal Code section 1203.4 would remove the disqualification imposed by Government Code section 1029 and allow an ex-felon to be a peace officer.

Penal Code section 1203.4 states in relevant part:

"(a) In any case in which a defendant has fulfilled the conditions of probation for the entire period of probation, or has been discharged prior to the termination of the period of probation, or in any other case in which a court, in its discretion and the interests of justice, determines that a defendant should be granted the relief available under this section, the defendant shall, at any time after the termination of the period of probation, if he is not then serving a sentence for any offense, on probation for any offense, or charged with the commission of any offense, be permitted by the court to withdraw his plea of guilty or plea of nolo contendere and enter a plea of not guilty; or, if he has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and, in either case, the court shall thereupon dismiss the

accusations or information against the defendant and except as noted below, *he shall thereafter be released from all penalties and disabilities resulting from the offense of which he has been convicted*, except as provided in Section 13555 of the Vehicle Code. The probationer shall be informed, in his probation papers, of this right and privilege and his right, if any, to petition for a certificate of rehabilitation and pardon. The probationer may make such application and change of plea in person or by attorney, or by the probation officer authorized in writing; provided, that, in any subsequent prosecution of the defendant for any other offense, the prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed; and provided further that the order shall state, and the probationer shall be informed, that the order does not relieve him of the obligation to disclose the conviction in response to any direct question contained in any questionnaire or application for public office or for licensure by any state or local agency.

"Dismissal of an accusation or information pursuant to this section does not permit a person to own, possess, or have in his custody or control any firearm capable of being concealed upon the person or prevent his conviction under Section 12021." (Emphasis added.)

The crucial question is whether disqualification from employment as a peace officer is a "penalty" or "disability" from which the Legislature intended to release persons granted relief under Penal Code section 1203.4. Conversely the question could be phrased as whether the Legislature intended the felony conviction referred to in Government Code section 1029 to include a conviction for which relief has been granted under section 1203.4.

In determining the legislative intent behind section 1203.4 the courts have found that "penalties and disabilities" refer to criminal penalties or "to matters of kindred nature." (*Copeland* v. *Dept. of Alcoholic Bev. Control* (1966) 241 Cal.App.2d 186, 188.) Relief granted thereunder does not remove the fact of conviction. (*Meyer* v. *Board of Medical Examiners* (1949) 34 Cal.2d 62.) Such a conviction may be used as the basis to suspend a physician's license for unprofessional conduct (*id.*), to disbar an attorney (*In re Phillips* (1941) 17 Cal.2d 55), or support deportation (*Gonzalez de Lara* v. *United States* (5th Cir. 1971) 439 F.2d 1316). Such uses are not barred by section 1203.4 relief because they are "for protection of the public in the exercise of the police power and not for the purpose of punishing . . . ." (*Copeland* v. *Dept. of Alcoholic Bev. Control*, *supra*, 241 Cal.App.2d 188.)

The public protection rationale clearly underlies the disqualification of Government Code section 1029 also. The purpose of that statute is "to assure, insofar as

possible, the good character and integrity of peace officers and to avoid the appearance to members of the public that the persons holding public positions having the status of peace officers may be untrustworthy." (*Hetherington* v. *State Personnel Bd.*, *supra*, 82 Cal.App.3d at p. 590.)

> "[Peace officers] can perform their duties only if they merit the trust and confidence of the mass of law-abiding citizens. Whatever weakens that trust tends to destroy our system of law enforcement." (*McCain* v. *Sheridan* (1958) 160 Cal.App.2d 174, 177, cited at *id.*, at p. 590.)

> "The courts are especially solicitous of the character of an officer 'who, in dealing with juvenile delinquents, must inculcate and foster respect for parental, school and other legal authority. . . .' (See *Johnson* v. *County of Santa Clara* (1973) 31 Cal.App.3d 26, 34)" (*Hetherington* v. *State Personnel Bd.*, *supra*, 82 Cal.App.3d at p. 591.)

Accordingly we stated in a previous opinion concerning a conviction set aside under the Federal Youth Correction Act (18 U.S.C. § 5005 et seq.):

> "We view the eligibility requirements of section 1029 as not a punishment, but a legitimate exercise of the state police power in the area of qualifications of persons holding the 'special position' of peace officer for the state." (63 Ops.Cal.Atty. Gen. 591, 598 (1980.)

The Legislature has enacted specific statutory exceptions to the mandatory disqualification of ex-felons from peace officer employment. An ex-felon who has been granted a full and unconditional pardon may be employed as a parole officer pursuant to an exception in Government Code section 1029 itself. And in 1976 Welfare and Institutions Code section 1772, a statute which provides for "release from all penalties and disabilities" resulting from their committing offenses for persons honorably discharged from the Youth Authority, was amended to allow such persons to be hired as peace officers by the Youth Authority. Prior to that amendment it was the opinion of this office that the "release from all penalties and disabilities" found in section 1772 did not remove the disqualification of Government Code section 1029. In an unpublished opinion dated May 16, 1975 (I.L. 75-99), we stated:

> "The fact that the Legislature has specifically required a pardon for peace officer status in spite of the fact that a person may otherwise have been released from penalties and disabilities pursuant to section 1772 presumes that the effect of the law did not affect the necessary requisites to obtain peace officer status."

On the same basis we concluded in an unpublished opinion issued February 27, 1976 (I.L. 76-45) that a convicted felon could not be employed as a probation officer despite relief granted under Penal Code section 1203.4.

As no modification has been made to section 1203.4 similar to the 1976 amendment to Welfare and Institutions Code section 1772, we follow our 1976 opinion and again conclude that the release from "all penalties and disabilities" in section 1203.4 does not affect the disqualification of Government Code section 1029.[2]

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[2] Our opinion was also requested on the question of whether lack of United States citizenship would disqualify a person from a job that required having custody of wards (i.e., a peace officer position) in an institution operated by the probation department in a general law county. However, it is the policy of this office not to issue opinions on matters currently in litigation. Government Code section 1031(a) (which requires all California peace officers to be United States citizens) was found to be unconstitutional in *Chavez-Salido* v. *Cabell* (1977) 427 F.Supp. 158, a case involving deputy probation officers. This decision was vacated by the United States Supreme Court (*City of L.A.* v. *Chavez-Salido* (1978) 436 U.S. 901) and remanded for reconsideration in light of *Foley* v. *Connelie* (1978) 435 U.S. 291 in which the court upheld a New York statute requiring all state police officers to be citizens. On remand the statute was again found to be unconstitutional (*Chavez-Calido* v. *Cabell* (1980) 490 F.Supp. 984) and is currently pending appeal to the United States Supreme Court where probable jurisdiction was noted March 9, 1981 (___ U.S. ___, 101 S.Ct. 1511.)