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OPINION	:	No. 82-403
	:	
of	:	<u>AUGUST 6, 1982</u>
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THE HONORABLE GLORIA V. BECERRA, DIRECTOR,
EMPLOYMENT DEVELOPMENT DEPARTMENT, has requested an opinion on the
following questions as revised and restated:

1. Is the Governor authorized to obligate the state to pay interest on a federal loan under title XII of the Social Security Act to the state unemployment fund?
2. Assuming that the Governor is not so authorized, may the Legislature confer upon the Governor such authority to obligate the state to pay interest on a federal loan under title XII of the Social Security Act to the state unemployment fund?

CONCLUSIONS

1. The Governor is not authorized to obligate the state to pay interest on a federal loan under title XII of the Social Security Act to the state unemployment fund.

2. The Legislature may not confer upon the Governor authority to obligate the state to pay interest on a federal loan under title XII of the Social Security Act to the state unemployment fund.

ANALYSIS

Under the provisions of sections 1201 and 1202 of title XII of the Social Security Act, title 42, United States Code sections 1321 and 1322, the federal government, acting through the Department of Labor, is authorized to make repayable advances to state unemployment funds. Pursuant to the amendatory provisions of section 2407 of Public Law 97-35 (Omnibus Budget Reconciliation Act of 1981) interest will be charged on any such advance received between April 1, 1982, and December 31, 1987. Sections 1321 and 1322, as amended, of title 42, United States Code, are fully set forth in appendix A. As a condition precedent of any such advance the Secretary of Labor has required an opinion by the attorney general of a requesting state that the governor's application for such advance creates a valid legal obligation of the state to pay the interest which would accrue during the term of the loan. Accordingly, we must consider whether a federal loan under title XII of the Social Security Act to the California unemployment fund, pursuant to an application therefor by the Governor in accordance with the provisions of section 1321, subdivision (a)(1), of title 42, United States Code, would create under the constitution and laws of this state a valid legal obligation of this state to pay such interest.

The initial inquiry concerns the authority of the Governor to incur such an obligation. The executive branch can exercise only such powers as are expressly or by implication conferred by the constitution and laws of this state. (31 Ops.Cal.Atty.Gen. 250, 251 (1958).) Thus, public officers, including constitutional officers, have special and limited jurisdiction. (63 Ops.Cal.Atty.Gen. 840, 841 (1980).) The Governor, as chief executive (Cal. Const., art. V, § 1), transacts all executive business with the officers of the executive branch in a manner, by the methods and within the limitations prescribed by the constitution and laws. (1 Ops.Cal.Atty.Gen. 231 (1943).) The Governor is the sole official organ of communication between the government of this state and of any other state or of the United States. (Gov. Code, § 12012.) If, therefore, the Governor would bind the state in any manner to its prejudice or contract a pecuniary obligation, specific constitutional or statutory authority must be found for him, or for a subordinate executive officer, to do so. (*Mullan v. State of California* (1896) 114 Cal. 578; 1 Ops.Cal.Atty.Gen. 231, *supra*.) "The Legislature has no power . . . to authorize the payment of a claim against the state . . . under

an agreement made without authority of law" (Cal. Const., art. IV, § 17),¹ and any agreement made without such authority in force at the time it is made is absolutely void. (*Pac. Inter-Club Yacht Assn. v. Richards* (1961) 192 Cal.App.2d 616, 619; 65 Ops.Cal.Atty.Gen. 66, 68 (1982).)

The Governor has powers derived both from the state Constitution and from statutes enacted by the Legislature. No ostensible statutory authority for the incurrence of any such pecuniary obligation has been found. Article V, section 1, of the state Constitution vests in the Governor "supreme executive power," and directs him to see that the "law is faithfully executed." In contrast, article IV, section 1, provides that "[t]he legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum." Further, article III, section 3, provides that "[t]he 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." Under this separation of powers the decision of the State of California to participate in a federal program is essentially legislative and the Legislature has the exclusive power to determine whether, the manner in which, and the conditions under which the state shall participate. Thus, it is the state that makes the application for a federal loan, and the decision to do so, as a policy matter, is fundamentally legislative. (Cf. 62 Ops.Cal.Atty.Gen. 781, 784 (1979).)

We have consistently determined in related contexts that officers of the executive branch are not constitutionally authorized to contract pecuniary obligations. In 31 Ops.Cal.Atty.Gen. 250, *supra*, it was concluded that the Director of Employment was authorized under section 451 of the California Unemployment Insurance Code² to execute

¹ Cf. article XVI, section 7: "Money may be drawn from the Treasury only through an appropriation made by law" See also Government Code sections 925.4 and 12440. Thus, "[u]nder [these] provisions . . . the authority and duty of the Controller . . . to draw warrants upon the Treasurer is in the first instance limited to those cases in which he is authorized by some law to do so, *and* in which the law has also provided a specific appropriation for its payment." (*Stratton v. Green* (1872) 45 Cal. 149, 151; accord *Raymond v. Christian* (1937) 24 Cal.App.2d 92, 110, 113.)

² Hereinafter, unidentified section references are to said code. Section 451 provides:

"The administration of this division and of other state and federal unemployment compensation and public employment service laws will be promoted by cooperation between this State and such other states and the appropriate federal agencies in exchanging services, and making available facilities and information. The director may make investigations, secure and transmit information, make available services and facilities and exercise other powers provided with respect to the administration of this division which he finds necessary or appropriate to facilitate the administration of any

an agreement with the Secretary of Labor to obtain for California claimants the federal benefits afforded by the Temporary Unemployment Compensation Act of 1958. It was emphasized, however, that the agreement did not involve any legal obligation to restore to the United States any federal funds or interest thereon. In 1 Ops.Cal.Atty.Gen. 231, *supra*, it was concluded that the Governor could execute an agreement with the federal office of Civilian Defense for the loan to the state of certain federal equipment since no pecuniary obligation was imposed upon the state by the agreement.

The essential distinction is, of course, that an application under title XII of the Social Security Act for a federal loan to the state unemployment fund³ would involve an obligation to repay the principal and interest. In 63 Ops.Cal.Atty.Gen. 840, *supra*, it was determined that the State Treasurer could not, in the absence of specific statutory authority, incur a pecuniary obligation by borrowing against time deposits, even for purposes of securing a higher return. Similarly, we now conclude that the Governor is not authorized to obligate the state to pay interest on a federal loan under title XII of the Social Security Act to the State unemployment fund.

The second inquiry concerns the authority of the Legislature by statute to confer such power upon the Governor. Accordingly, we now consider whether the Legislature *could* constitutionally authorize an application under title XII of the Social Security Act.

state or federal unemployment compensation or public employment service law, and may accept and utilize information, services and facilities made available to this State by an agency charged with the administration of any such other state or federal law."

³ Section 1521 provides:

"The Unemployment Fund is continued in existence as a special fund, separate and apart from all public money or funds of this state. This fund shall consist of (1) all employer contributions collected under this division; (2) interest earned upon any money in the fund; (3) any property or securities acquired through the use of money belonging to the fund; (4) all earnings of such property or securities; (5) all money credited to this state's account in the Unemployment Trust Fund pursuant to Section 903 of the Social Security Act, as amended; and (6) all other money received from the fund from any other source. All money in the fund shall be mingled and undivided.

"All money in the Unemployment Fund and in the various accounts of that fund, except any money deposited pursuant to Section 1528.5, is continuously appropriated without regard to fiscal years for the purposes authorized in this article."

The reference to section 903 is to title 42 United States Code section 1103. Cf. generally, 29 Ops.Cal.Atty.Gen. 105, 107 (1957).

The fundamental law of the state regarding the creation of a debt is found in article XVI, section 1,⁴ of the California Constitution:

"The Legislature shall not, in any manner create any debt or debts, liability or liabilities, which shall, singly or in the aggregate with any previous debts or liabilities, exceed the sum of three hundred thousand dollars (\$300,000), except in case of war to repel invasion or suppress insurrection, unless the same shall be authorized by law for some single object or work to be distinctly specified therein which law shall provide ways and means, exclusive of loans, for the payment of the interest of such debt or liability as it falls due, and also to pay and discharge the principal of such debt or liability within 50 years of the time of the contracting thereof, and shall be irrepealable until the principal and interest thereon shall be paid and discharged, and such law may make provision for a sinking fund to pay the principal of such debt or liability to commence at a time after the incurring of such debt or liability of not more than a period of one-fourth of the time of maturity of such debt or liability; but no such law shall take effect unless it has been passed by a two-thirds vote of all the members elected to each house of the Legislature and until, at a general election or at a direct primary, it shall have been submitted to the people and shall have received a majority of all of the votes cast for and against it at such election; and all moneys raised by authority of such law shall be applied only to the specific object therein stated or to the payment of the debt thereby created. . . ."

The language of article XVI, section 1, of the California Constitution is so plain and unambiguous as to "defy the ingenuity of the most subtle intellect to invent a consistent interpretation, other than that which naturally suggests itself from the words of the article." (*People v. Johnson* (1856) 6 Cal. 499, 501; *Nougues v. Douglass* (1857) 7 Cal. 65, 66-67.) By its terms, the Legislature may not, without a vote of the people, except in the case of invasion or insurrection, create any debt or liability so that the aggregate of

⁴ Section 6 of article XVI provides:

"The Legislature shall have no power to give or to lend, or to authorize the giving or lending, of the credit of the State . . . in aid of or to any person, association, or corporation, whether municipal or otherwise"

Assuming that the federal government falls within the terms of this section (cf. 9 Ops.Cal.Atty.Gen. 87, 89 (1947); but compare, 31 Ops.Cal.Atty.Gen. 250, *supra*), it does not, under the "public purpose" test (*California Housing Finance Agency v. Elliott* (1976) 17 Cal.3d 575, 583; cf. 65 Ops.Cal.Atty.Gen. 66, 69 n. 4) and because of the specified maximum amount (*Miller v. Johnson* (1935) 4 Cal.2d 265, 267; 60 Ops.Cal.Atty.Gen. 59, 61 (1977)), pose a critical problem.

indebtedness or liability of the state exceeds \$300,000. This prohibition was intended to prevent the state from running into debt and to keep its expenditures within its revenues. (*State of California v. McCauley* (1860) 15 Cal. 429, 455; *People v. Johnson, supra*, 6 Cal. at pp. 503-504.)

Article XVI, section 1, of the California Constitution refers to indebtedness which would constitute a legally enforceable obligation against the state's general funds or taxing power. (*California Housing Finance Agency v. Elliott* (1976) 17 Cal.3d 575, 588; *California Educational Facilities Authority v. Priest* (1974) 12 Cal.3d 593, 607.) No such debt is created if the funds to repay an obligation are to be derived solely from revenue from a special fund. (*California Housing Finance Agency v. Elliott, supra*, at p. 587; 63 Ops.Cal.Atty.Gen., *supra*, 843, n. 2.) It may be recalled in this regard that section 1521 establishes the unemployment fund "as a special fund, separate and apart from all public money or funds of this state." (Fn. 3, *supra*.) Further, section 1522 provides that the fund ". . . shall be administered by the director exclusively for the purposes of this division without liability upon the part of the state beyond the amounts paid into and earned by the fund." (Cf. 64 Ops.Cal.Atty.Gen. 482, 488 (1981).) Under federal law, however, California may not pay the required interest directly or indirectly from amounts in its unemployment fund. (42 U.S.C. § 1322(b)(5).)

Nor are the constraints of section 1 of article XVI affected by the provisions of section 11 thereof:

"The Legislature has plenary power to provide for the administration of any constitutional provisions or laws heretofore or hereafter enacted concerning the administration of relief, and to that end may modify, transfer, or enlarge the powers vested in any state agency or officer concerned with the administration of relief or laws appertaining thereto. *The Legislature, or the people by initiative, shall have power to amend, alter, or repeal any law relating to the relief of hardship and destitution, whether such hardship and destitution results from unemployment or from other causes*, or to provide for the administration of the relief of hardship and destitution, whether resulting from unemployment or from other causes, either directly by the State or through the counties of the State, and to grant such aid to the counties therefor, or make such provision for reimbursement of the counties by the State, as the Legislature deems proper." (Emphasis added.)

It is clear from the ballot arguments⁵ in conjunction with the general election of November 8, 1938, that the purpose and effect of section 11 was to assure that the Legislature, in spite of a perceived contrary implication of section 10 as it then appeared, would have the power to provide a general plan for the administration of relief under the Department of Social Welfare, to establish standards for the administration of relief, and to open the way for joint state and county administration of direct relief of destitution and hardship whether resulting from unemployment or otherwise.⁶ (See *City of Los Angeles v. Post War etc. Bd.* (1945) 26 Cal.2d 101, 112-113.) The amendment of section 11 at the general election of November 6, 1962, as expressly indicated by the ballot arguments, did not accomplish any substantive change. Hence, nothing in section 11 may be construed to authorize unlimited public debt for purposes of unemployment relief.

In connection with the constitutional limitation on the power of the state to incur a debt,⁷ such term is not employed in a technical sense, but refers particularly to the basic warrant and legislative authority on which a public obligation must rest and on which alone such debt must find its sanction in order to obligate the state to pay. (63 Ops.Cal.Atty.Gen., *supra*, 843.) It has been observed that the constitutional limitation on indebtedness pertains not to the total amount of indebtedness, but to the manner in which such indebtedness beyond the designated limit may be created. (*Bickerdike v. State* (1904) 144 Cal. 681, 695.) Thus, the Legislature may not, in the absence of an appropriation, and without compliance with the procedures set forth in article XVI, section 1, of the California Constitution, including a two-thirds vote of all the members elected to each house of the Legislature and a majority vote of the people, confer upon the Governor authority to

⁵ Where an enactment follows voter approval, the ballot summary, arguments, and analysis presented to the electorate in connection with a particular measure may be helpful in determining the probable meaning of uncertain language. (*Los Angeles County Transportation Com. v. Richmond* (1982) 31 Cal.3d 197, 203; 64 Ops.Cal.Atty.Gen. 597, 616 (1981).)

⁶ Section 11 also serves to emphasize that in the exercise of its police power the state may act to provide for the general welfare, including economic welfare. (Cf. *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 160; 65 Ops.Cal.Atty.Gen. ___, ___ (No. 81-506, 1982); 63 Ops.Cal.Atty.Gen. 905, 906-907 (1980).)

⁷ No such debt is created where the Legislature, at the time of authorizing an obligation, appropriates sufficient funds for payment. (*Flournoy v. Priest* (1971) 5 Cal.3d 350, 354; and see *Riley v. Johnson* (1936) 6 Cal.2d 529; 8 Ops.Cal.Atty.Gen. 170, 175 (1946).) While monies in the unemployment fund are continuously appropriated (§ 1521, fn. 3, *supra*; see generally, 63 Ops.Cal.Atty.Gen. 777, 781-784 (1980); 63 Ops.Cal.Atty.Gen. 125, 126-127 (1980)), such monies are, as previously noted, not available for the repayment of interest. (42 U.S.C. § 1322(b)(5).)

obligate the state to pay interest⁸ on a federal loan under title XII of the Social Security Act to the state unemployment fund. (Cf. 63 Ops.Cal.Atty.Gen., *supra*, at pp. 841-844.)

⁸ In view of our conclusion that the state may not incur the interest obligation which is a condition of any such advance, we do not consider whether the state may accept a repayable advance not conditioned upon such interest obligation.

APPENDIX "A"

"§ 1321.

"(a)(1) Advances shall be made to the States from the Federal unemployment account in the Unemployment Trust Fund as provided in this section, and shall be repayable, with interest to the extent provided in section 1322(b) of this title in the manner provided in sections 1101(d)(1), 1103(b)(2), and 1322 of this title. An advance to a State for the payment of compensation in any 3-month period may be made if—

"(A) The Governor of the State applies therefor no earlier than the first day of the month preceding the first month of such 3-month period and

"(B) He furnishes to the Secretary of Labor his estimate of the amount of an advance which will be required by the State for the payment of compensation in each month of such 3-month period.

"(2) In the case of any application for an advance under this section to any State for any 3-month period, the Secretary of Labor shall—

"(A) determine the amount (if any) which he finds will be required by such State for the payment of compensation in each month of such 3-month period; and

"(B) certify to the Secretary of the Treasury the amount (not greater than the amount estimated by the Governor of the State) determined under subparagraph (A).

"The aggregate of the amounts certified by the Secretary of Labor with respect to any 3-month period shall not exceed the amount which the Secretary of the Treasury reports to the Secretary of Labor is available in the Federal unemployment account for advances with respect to each month of such 3-month period.

"(3) For purposes of this subsection—

"(A) an application for an advance shall be made on such forms, and shall contain such information and data (fiscal and otherwise) concerning the operation and administration of the State unemployment compensation law,

as the Secretary of Labor deems necessary or relevant to the performance of his duties under this subchapter,

"(B) the amount required by any State for the payment of compensation in any month shall be determined with due allowance for contingencies and taking into account all other amounts that will be available in the State's unemployment fund for the payment of compensation in such month, and

"(C) the term 'compensation' means cash benefits payable to individuals with respect to their unemployment, exclusive of expenses of administration.

"(b) The Secretary of the Treasury shall, prior to audit or settlement by the General Accounting Office, transfer in monthly installments from the Federal unemployment account to the account of the State in the Unemployment Trust Fund the amount certified under subsection (a) of this section by the Secretary of Labor (but not exceeding that portion of the balance in the Federal unemployment account at the time of the transfer which is not restricted as to use pursuant to section 1103(b)(1) of this title). The amount of any monthly installment so transferred shall not exceed the amount estimated by the State to be required for the payment of compensation for the month with respect to which such installment is made."

"§ 1322.

"(a) The Governor of any State may at any time request that funds be transferred from the account of such State to the Federal unemployment account in repayment of part or all of that balance of advances, made to such State under section 1321 of this title, specified in the request. The Secretary of Labor shall certify to the Secretary of the Treasury the amount and balance specified in the request; and the Secretary of the Treasury shall promptly transfer such amount in reduction of such balance.

"(b)(1) Except as otherwise provided in this subsection, each State shall pay interest on any advance made to such State under section 1321 of this title. Interest so payable with respect to periods during any calendar year shall be at the rate determined under paragraph (4) for such calendar year.

"(2) No interest shall be required to be paid under paragraph (1) with respect to any advance made during any calendar year if—

"(A) such advance is repaid in full before the close of September 30 of the calendar year in which the advance was made, and

"(B) no other advance was made to such State under section 1321 of this title during such calendar year and after the date on which the repayment of the advance was completed.

"(3)(A) Interest payable under paragraph (1) which was attributable to periods during any fiscal year shall be paid by the State to the Secretary of the Treasury not later than the first day of the following fiscal year. If interest is payable under paragraph (1) on any advance (hereinafter in this subparagraph referred to as the 'first advance') by reason of another advance made to such State after September 30 of the calendar year in which the first advance was made, interest on such first advance attributable to periods before such September 30 shall be paid not later than the day after the date on which the other advance was made.

"(B) Notwithstanding subparagraph (A), in the case of any advance made during the last 5 months of any fiscal year, interest on such advance attributable to periods during such fiscal year shall not be required to be paid before the last day of the succeeding taxable year. Any interest the time for payment of which is deferred by the preceding sentence shall bear interest in the same manner as if it were an advance made on the day on which it would have been required to be paid but for this subparagraph.