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OPINION	:	No. 83-401
	:	
of	:	<u>MARCH 1, 1984</u>
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THE STATE PERSONNEL BOARD has requested an opinion on the following question:

Does section 7.9 of the Government Code, providing in part that at the request of the Controller or the Treasurer two employees of each officer who hold permanent civil service status and have been designated deputies under that section shall be classified and compensated as career executives at Category Level IV or Category Level V, violate section 1(b) or 3(a) of article VII of the California Constitution?

CONCLUSION

Section 7.9 of the Government Code does violate sections 1(b) and 3(a) of article VII of the California Constitution.

ANALYSIS

Government Code¹ section 7.9 provides as follows:

"Notwithstanding any provision of law to the contrary, the Controller or the Treasurer may designate any deputy of his or her office to act in his or her place and stead on any state board, commission, committee or governing board of a state agency with respect to the exercise of statutory powers and duties of any of those bodies. The deputy, while sitting on a board, commission, committee or governing board of a state agency may exercise the same powers that the Controller or the Treasurer may exercise as if he or she were personally present. The Controller or the Treasurer so designating a deputy shall be responsible for the acts of the deputy acting under the designation in the same manner and to the same extent that the Controller or the Treasurer is responsible for the acts of the deputy performing his or her official duties as deputy to the Controller or Treasurer.

"At the request of the Controller or the treasurer, two employees of each office, who hold permanent civil service status and have been designated deputies under this section, shall be classified and compensated as career executives at Category Level IV or Category Level V."

The present inquiry is whether the second paragraph of this section, added by chapter 828 of the Statutes of 1982, violates the following provisions of article VII of the California Constitution. Section 1 provides for competitive examinations in the state civil service:

"(a) The civil service includes every officer and employee of the state except as otherwise provided in this Constitution.

"(b) In the civil service permanent appointment and promotion shall be made under a general system based on merit ascertained by competitive examination."

Section 3, subdivision (a), vests in the State Personnel Board ("board," *post*) the authority to prescribe classifications:

"The board shall enforce the civil service statutes and, by majority vote of all its members, shall prescribe probationary periods and

¹ Hereinafter, all section references are to said code.

classifications, adopt other rules authorized by statute, and review disciplinary actions."

We first address the board's constitutional prerogative to prescribe classifications. In furtherance of this constitutional power the board is statutorily required to create and adjust classes of positions in the state civil service, including a descriptive title and a definition outlining the scope of the duties and responsibilities for each class of positions. (§§ 18702, 18800, 18802.) A "class" is defined (§ 18523) as:

"... a group of positions sufficiently similar with respect to duties and responsibilities that the same title may reasonably and fairly be used to designate each position allocated to the class and that substantially the same tests of fitness may be used and that substantially the same minimum qualifications may be required and that the same schedule of compensation may be made to apply with equity."

Every position in the state civil service must be allocated or reallocated by the board to the appropriate class. (§§ 18801, 18802, 18803, 18804, 18805.) A "position" is any office or employment in the state service except those exempted under section 4 of article VII of the California Constitution. (§ 18522.)² A position in the state service is established by an appointing power pursuant to statutory and budgetary authorization. (§ 18805.) An appointing power is a person or group having authority to make appointments to positions in the state civil service. (§ 18524.)

Within the state civil service is the distinct category of career executive assignments. Section 18546 provides:

"'Career executive' means an employee appointed from an employment list established for the express purpose of providing a list of persons with permanent status in the civil service who are available for career executive assignments, in which selection, classification, salary, tenure, and other conditions of employment may be varied from those prevailing under Chapters 3 through 8 of Part 2 for other employees in the state civil service."

² While a deputy and an employee selected by each elected officer, including the Controller and the Treasurer, are exempt (§ 4, subd. (c)), the present inquiry and attendant analysis concern two employees of said officers "who hold permanent civil service status." (§ 7.9.)

Section 18547 provides:

"'Career executive assignment' means an appointment to a high administrative and policy influencing position within the state civil service in which the incumbent's primary responsibility is the managing of a major function or the rendering of management advice to top-level administrative authority. Such a position can be established only in the top managerial levels of state service and is typified by broad responsibility for policy implementation and extensive participation in policy evolvement. Assignment by appointment to such a position does not confer any rights or status in the position other than provided in Article 8 (commencing with Section 19220) of Chapter 6 of this part [now art. 9 (commencing with § 19889) of ch. 2.5 of pt. 2.6 of div. 5 of tit. 2]."

Section 19889 establishes the career executive program:

"It is the purpose of this article to encourage the development and effective use in the civil service of well-qualified and carefully selected executives. In order to carry out this purpose the State Personnel Board shall establish by rule a system of merit personnel administration specifically suited to the selection and placement of managerial personnel. The department shall be responsible for the motivation and training of managerial personnel. For the purpose of administering this system there is established herewith a category of civil service appointment called 'career executive assignments.' The department may designate positions of a high administrative and policy influencing character for inclusion in or removal from this category with the approval of the State Personnel Board, except that the department shall not so designate a position in which there is an incumbent already appointed under the provisions of this part governing employees other than career executives."³

Thus, the department, subject to board approval, may designate for inclusion in the career executive category certain vacant positions. Such a designation does not involve the creation of any new positions. As stated in *Cryor v. State Personnel Board* (1967) 253 Cal.App.2d 100, 106:

"Neither the statute providing' for career executive assignments nor the board's action in putting the program in motion has created any positions.'

³ The term "department" in the statute and hereinafter refers to the Department of Personnel Administration. (§ 19815.)

Positions in the state service are established by the appointing power having jurisdiction in the particular agency, as authorized by law and subject to the budget. (Gov. Code, § 18805.) Civil service laws provide procedures for filling vacant positions and establish the tenure and other rights of the person lawfully appointed. Government Code, section 19220, et seq., [now, § 19889 et seq.] merely provide a different method of selection, and different rights on the part of the person appointed during such time as the position has been designated by the Personnel Board to be a career executive assignment."

Section 7.9 provides that certain permanent civil service "employees . . . shall be classified and compensated as career executives at Category Level IV or Category Level V."⁴ While this section does not establish any new positions, it purports to reallocate existing positions to other classifications. Under its constitutional authority to prescribe classifications, the jurisdiction of the board to classify each position in the state civil service is exclusive. (*Stockton v. Department of Employment* (1944) 25 Cal.2d 264, 272; and see *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 187.)⁵ Section 7.9 directly impairs the exclusive authority of the board under section 3, subdivision (a), of article VII of the California Constitution.

We next consider the constitutional mandate that in the state civil service "permanent appointment and promotion shall be made under a general system based on merit ascertained by competitive examination." As previously noted, it is, under the general statutes pertaining to career executive assignments (§ 19889, *supra*), the responsibility of the department, subject to board approval, to designate for inclusion in the career executive category certain vacant positions. Section 19889.3 provides that eligibility for appointment to positions in the career executive category shall be established as a result of competitive examination of persons with permanent status in the civil service who meet such minimum qualifications as the board may determine are requisite to the performance of high administrative and policy influencing functions. (See also tit. 2, Cal. Admin. Code, § 548.40 et seq.; § 548.70.)

On the other hand, it is plain that section 7.9 operates upon certain existing and *occupied* positions and that the incumbent employees would receive a substantial

⁴ While the statute purports to operate upon the employees, it may only be reasonably understood as a legislative designation, without board approval and in lieu of any such designation by the department, of certain existing occupied positions for inclusion within the career executive category.

⁵ We are not asked and therefore express no opinion respecting the constitutional sufficiency of section 19889 authorizing the department "with the approval of the [board]" to designate positions for inclusion in or removal from the career executive category.

increase in salary. Further, the transaction shall occur "at the request" of the Controller or Treasurer as the case may be. No examination is contemplated. In *Pacific Legal Foundation v. Brown*, *supra*, 29 Cal.3d 182-184, the court expounded upon the nature and historical basis of the constitutional principle of merit appointment and promotion in the state civil service:

"It was in this milieu and in response to the specific problems of the times that in 1934 the people adopted article XXIV of the state Constitution. The ballot argument accompanying the 1934 initiative measure sets forth in clear terms both the objectives and the limits of the proposed constitutional provision.

"The ballot argument stated: 'The purpose of this constitutional amendment is to promote efficiency and economy in State government. *The sole aim of the act is to prohibit appointments and promotion in State service except on the basis of merit, efficiency and fitness ascertained by competitive examination.* Appointments or inefficient employees for political reasons are thereby prohibited, thus eliminating the "spoils system- from State employment. [¶] . . . [T]his constitutional amendment provides: (1) Employment in the classified service based solely on merit and efficiency; (2) a nonpartisan Personnel Board; (3) prohibition against exemptions from the merit system of employment; (4) correction of the temporary political appointment evil. [¶] Having by constitutional mandate prohibited employment on any basis except merit and efficiency, thereby eliminating as far as possible the "spoils system" of employment, the Legislature is given a free hand in setting up laws relating to personnel administration for the best interests of the State, including the setting up of causes for dismissal such as inefficiency, misconduct or lack of funds.' (Italics added.) (Ballot Pamp., Proposed Amends. to Cal. Const., with arguments to voters, Gen. Elec. (Nov. 6, 1934), argument in favor of Prop. 7, p. 12.)

"As this ballot argument demonstrates, the 'sole aim' of the amendment was to establish, as a constitutional mandate, the principle that appointments and promotions in state service be made solely on the basis of merit. Having established this 'merit principle' as a matter of constitutional law, and having established a nonpartisan Personnel Board to administer this merit principle, the constitutional provision left the Legislature with a free

hand to fashion 'laws relating to personnel administration for the best interests of the State.'" (Emphases in original; fns. omitted.)⁶

It is well settled that a permanent civil service employee shall not gain status in any higher classification than that to which he has been lawfully appointed pursuant to competitive examination. (*Otto v. Reardon* (1937) 21 Cal.App.2d 260; *Noce v. Department of Finance* (1941) 45 Cal.App.2d 5; and cf. *Allen v. State Board of Equalization* (1941) 43 Cal.App.2d 90; *Stockton v. Department of Employment* (1944) 25 Cal.2d 264; *Ligon v. State Personnel Board* (1981) 123 Cal.App.3d 583.)⁷ It is apparent that section 7.9, which operates upon existing occupied positions, effects promotions without the benefit of examination. Further, the designation by the Controller or Treasurer of certain employees for promotion directly impairs the exclusive authority of the board under section 1, subdivision (b), of article VII of the California Constitution in the determination of any matter involved in the examination and selection process of civil service personnel. (56 Ops.Cal.Atty.Gen. 217 (1973).)

It is concluded that section 7.9 violates sections 1, subdivision (b), and 3, subdivision (a), of article VII of the California Constitution.

⁶ "The current provisions of article VII derive

directly from the provisions of former article XXIV. The 1934 version of article XXIV was revised in 1970 under the auspices of the California Constitutional Revision Commission, but the revision made no substantive changes in the provisions relevant to this action and merely deleted obsolete and superfluous language from the original provisions. (See Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 3, 1970) pp. 23-24.) Under a constitutional reorganization measure in 1976, article XXIV was repealed but its provisions were adopted verbatim as article VII. (See Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Prim. Elec. (June 8, 1976) pp. 58-59.)" (*Id.*, at 184, n. 8; 63 Ops.Cal.Atty.Gen. 24, 31 n. 4 (1980).)

⁷ See also sections 18804 and 19255. Statutory standards of personnel selection in the regular civil service do not apply, however, to the career executive category except as provided by board rule. (§ 19889.2.)