

63 Ops. Cal. Atty. Gen. 583
Office of the Attorney General
State of California
Opinion No. 80-511
July 3, 1980

THE HONORABLE WILLIAM CAMPBELL
STATE SENATOR

THE HONORABLE WILLIAM CAMPBELL, STATE SENATOR, THIRTY-THIRD DISTRICT,
has requested an opinion on the following question:

Does Executive Order B-54-79, providing that the agencies, departments, boards and commissions within the Executive Branch of state government under the jurisdiction of the Governor shall not discriminate in state employment against any individual based solely upon the individual's sexual preference, constitute an improper infringement upon legislative authority with respect to the state civil service?

CONCLUSION

Executive Order B-54-79, providing that the agencies, department, boards and commissions within the Executive Branch of state government under the jurisdiction of the Governor shall not discriminate in state employment against any individual based solely upon the individual's sexual preference, does not constitute an improper infringement upon legislative authority with respect to the state civil service.

ANALYSIS

On April 4, 1979, the Governor of California issued Executive Order B-54-79, as follows:

'WHEREAS, Article I of the California Constitution guarantees the inalienable right of privacy for all people which must be vigorously enforced; and

'WHEREAS, government must not single out sexual minorities for harassment or recognize sexual orientation as a basis for discrimination; and

'WHEREAS, California must expend its investment in human capital by enlisting the talent of all members of society;

'NOW, THEREFORE, I, Edmund G. Brown Jr., Governor of the State of California, by virtue of the power and authority vested in me by the Constitution and statutes of the State of California, do hereby issue this order to become effective immediately:

'The agencies, departments, boards and commissions within the Executive Branch of state government under the jurisdiction of the Governor shall not discriminate in state employment against any individual based solely upon the individual's sexual preference. Any alleged acts of discrimination in violation of this directive shall be reported to the State Personnel Board for resolution.'

The question presented is whether this executive order constitutes an improper infringement upon the authority of the Legislature with respect to the state civil service. [FN1]

The Governor is authorized to issue directives, communicated verbally or by formal written order, to subordinate executive officers concerning the enforcement of law. Such authority emanates from his

constitutional charge, as the 'supreme executive power' of this state, to 'see that the laws are faithfully executed' (Cal. Const., art V, § 1) and by the very dimension of government which necessitates and requires the assistance and participation of others. Accordingly, Government Code section 12010 [FN2] provides that '[t]he Governor shall supervise the official conduct of all executive and ministerial officers.' An executive order, then, is a formal written directive of the Governor which by interpretation, or the specification of detail, directs and guides subordinate officers in the enforcement of a particular law. (Unpub. opn. of the Cal. Atty. Gen., No. I.L. 63-86 (1963). Such an order, however, need not be predicated upon some express statutory provision, but may properly be employed to effectuate a right, duty, or obligation which emanates or may be implied from the Constitution or to enforce public policy embodied within the Constitution and laws. (Cf. In re Neagle (1890) 135 U.S. 1, 63-64; Spear v. Reeves (1906) 148 Cal. 501, 504.)

*2 Nevertheless, the Governor may not invade the province of the Legislature. California Constitution, article III, section 3 provides as follows:

'The 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.'

Consequently, the Governor is not empowered, by executive order or otherwise, to amend the effect of, or to qualify the operation of existing legislation. (Lukens v. Nye (1909) 156 Cal. 498, 503-504; and cf. Contractors Ass'n of Eastern Pa. v. Secretary of Labor (1971) 442 F.2d 159, 168; unpub. opn. of the Cal. Atty. Gen., No. I.L. 78-32 (1978).)

We examine first the pertinent provisions of the State Civil Service Act, section 18500 et seq., to determine whether the executive order amends the effect thereof, or qualifies its operation. While the Legislature has not specifically addressed the subject of discrimination based on sexual preference [FN3] (cf. §§ 19700-19706), the executive order is not in conflict with any provision of the Act. On the contrary, numerous provisions require that personnel decisions be made on the basis of merit and fitness, and not otherwise. In this regard, section 18500, subdivision (c) provides, inter alia, that it is the purpose of the Act to provide a comprehensive personnel system wherein appointments are based upon merit and fitness as ascertained through practical and competitive examination. In accordance with such purposes, section 18900 provides:

'Eligible lists shall be established as a result of free competitive examinations open to all persons who lawfully may be appointed to any position within the class for which such examinations are held and who meet the minimum qualifications requisite to the performance of the duties of such position as prescribed by the specifications for the class of by board rule.'

Section 18930 provides in part:

'Examinations for the establishment of eligible lists shall be competitive and of such character as fairly to test and determine the qualifications, fitness and ability of competitors actually to perform the duties of the class of position for which they seek appointment.'

Section 18951 provides in part:

'The board and each state agency and employee shall encourage economy and efficiency in and devotion to state service by encouraging promotional advancement of employees showing willingness and ability to perform efficiently services assigned them, and every person in state service shall be permitted to advance according to merit and ability.'

Finally, section 19702.2 provides in pertinent part:

'Educational prerequisites or testing or evaluation methods which are not job related shall not be employed as part of hiring practices or promotional practices conducted pursuant to this part unless there is no adverse effect.'

It is clear, in view of the foregoing, that the prohibition against discrimination 'based solely upon the individual's sexual preference' within the purview of the executive order, and without regard, therefore, to the merit and fitness of such an individual, is wholly consistent with the Act and neither amends nor qualifies its effect or operation.

*3 Moreover, the executive order effectuates a right, duty, or obligation which emanates from the state and federal constitutions. With regard to the California Constitution specifically, article VII, section 1, subdivision (b) provides and requires that in the state civil service, permanent appointment and promotion shall be made under a general system based on merit ascertained by competitive examination. This section alone necessarily precludes arbitrary selection standards. [FN4]

As previously stated in 62 Ops.Cal.Atty.Gen. 180, 181-182 (1979):

'It is well established that no person may be denied government employment because of factors unconnected with the responsibilities of that employment. (Morrison v. State Board of Education (1969) 1 Cal.3d 214, 234; Vielehr v. State Personnel Board (1973) 32 Cal.App.3d 187, 192; Hetherington v. State Personnel Board (1978) 82 Cal.App.3d 582, 592.) Similarly, a number of 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. (Mindel v. United States Civil Service Commission (N.D. Cal. 1970) 312 F.Supp. 485, 488; Norton v. Macy (D.C. 1969) 417 F.2d 1161, 1164; Society for Individual Rights, Inc. v. Hampton (N.D. Cal. 1973) 63 F.R.D. 399, 401; Beazer v. New York City Trans. Auth. (S.D.N.Y. 1975) 399 F.Supp. 1032, 1057.)'

The agencies, departments, boards, and commissions of state government are prohibited, under the equal protection clauses of the state and federal constitutions, from employment discrimination on the basis of sexual preference in the absence of a showing that such quality would render an individual unfit for a particular job. (Gay Law Students Association v. Pacific Telephone & Telegraph Co. (1979) 24 Cal.3d 458, 467.)

It is concluded that Executive Order B-54-79 does not constitute an improper infringement upon the authority of the Legislature with respect to the state civil service.

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[FN1]. The constitutional mandate of the State Personnel Board is to enforce, and of its executive officer to administer, 'the civil service statutes.' (Cal. Const., art. VII, § 3.)

[FN2]. Hereinafter, all section references are to the Government Code.

[FN3]. While the executive order does not define the term 'sexual preference,' it is assumed for purposes of this analysis that such reference does not connote unlawful conduct. (Cf. Morrison v. State Board of Education (1969) 1 Cal.3d 214, 218.)

[FN4]. The executive order further provides that any alleged acts of discrimination in violation of the order shall be reported to the State Personnel Board for resolution. The Governor has thus designated the appropriate forum, the constitutional authority of which, in matters involving the examination and selection process of civil service personnel, is primary and exclusive. (56 Ops.Cal.Atty.Gen. 217 (1973); 63 Ops.Cal.Atty.Gen. 24, 31 (1980).)