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OFFICE OF THE AUDITOR GENERAL

California Legislature



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August 25, 1977

Letter Report 716.2

Honorable Eugene A. Chappie, Member
Joint Legislative Audit Committee
Room 2114, State Capitol
Sacramento, California 95814

Dear Assemblyman Chappie:

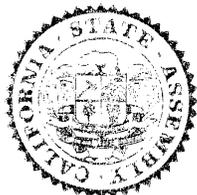
Your Joint Legislative Audit Committee respectfully forwards the Auditor General's letter report on the Use of Exempt Positions by the Department of Parks and Recreation.

The auditors are Thomas W. Hayes, Audit Manager; and Bill L. Myers.

Cordially,

MIKE CULLEN
Chairman

cc: Speaker of the Assembly
President pro Tempore of the Senate
Members of the Joint Legislative
Audit Committee



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August 23, 1977

Letter Report 716.2

Honorable Mike Cullen
Chairman, and Members of the
Joint Legislative Audit Committee
Room 5144, State Capitol
Sacramento, California 95814

Dear Mr. Chairman and Members:

In response to a resolution of the Joint Legislative Audit Committee, we reviewed the exempt position authorized for the Chief Deputy Director of the Department of Parks and Recreation. This review was conducted under the authority vested in the Auditor General by Section 10527 of the Government Code.

Section 11200 of the Government Code authorizes the Governor to appoint a Chief Deputy Director of the Department of Parks and Recreation. This appointee is currently serving as General Manager of Cal Expo. The Governor's appointment entitles the Chief Deputy Director to appoint a second exempt position pursuant to Article VII, Section 4(g) of the California Constitution. Section 11200 of the Government Code, however, does not restrict the use of this second position. The person filling this position is currently reporting to the Secretary of the Resources Agency.

Honorable Mike Cullen
Chairman, and Members of the
Joint Legislative Audit Committee
August 23, 1977
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According to the Director of Parks and Recreation, he has the administrative prerogative to direct the person appointed to an exempt position to report to any organizational function so long as the statute creating the position is silent on how the position is to be used. The Legislative Counsel has supported this premise (Appendix A). We were informed by representatives of the Department of Finance and the State Personnel Board that they do not have any policies which conflict with the Director's premise.

Our review of the use of exempt positions by other agencies revealed that agencies commonly borrow such positions from departments. Department of Finance representatives stated that each state agency currently has exempt positions on loan from its departments.

AB 1080 (Calvo), introduced in March 1977, would authorize the Governor to appoint within the Resources Agency an Assistant Secretary for Energy Matters and an Assistant Secretary for Coastal Matters. This legislation, if enacted, would provide the Resources Agency with four new exempt entitlements. The Agency informed us that if the four new exempt positions are authorized, the borrowed position would be redirected to the Department of Parks and Recreation.

We conclude, therefore, that neither the Department nor the Agency is in violation of applicable statutes concerning the use of the exempt position currently reporting to the Resources Agency.

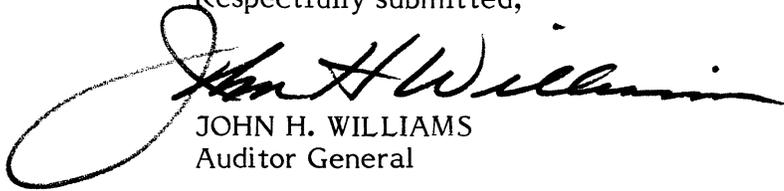
The Department of Parks and Recreation received 1977-78 funding for three exempt entitlements which were authorized by the Legislature but not funded during prior years. These entitlements were authorized by:

- Chapter 1152, Statutes of 1973 (Section 3302 of the Food and Agricultural Code), which created the California State Fair Advisory Commission.
- Chapter 1217, Statutes of 1976, which authorized the Governor (Section 3324 of the Food and Agricultural Code) to appoint a deputy within the Division of Exposition and State Fair (Cal Expo).
- Article VII, Section 4(g) of the Constitution, which authorizes a second exempt position for the deputy appointed under Section 3324.

Honorable Mike Cullen
Chairman, and Members of the
Joint Legislative Audit Committee
August 23, 1977
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The Director of Parks and Recreation has stated that each of the three exempt entitlements authorized by the two statutes will be used at Cal Expo (Appendix B, footnote b). He has also informed us that the Department is not seeking any new exempt entitlements.

Respectfully submitted,



JOHN H. WILLIAMS
Auditor General

Staff: Thomas W. Hayes, Audit Manager
B. L. Myers

Attachments: Response to the Auditor General's Report

Appendix A--Opinion of the Legislative Counsel

Appendix B--A Summary of Exempt Positions Authorized
for the Department of Parks and Recreation

OFFICE OF THE SECRETARY
RESOURCES BUILDING
1416 NINTH STREET
95814
(916) 445-5656

Department of Conservation
Department of Fish and Game
Department of Navigation and
Ocean Development
Department of Parks and Recreation
Department of Water Resources
Department of Forestry

EDMUND G. BROWN JR.
GOVERNOR OF
CALIFORNIA



Air Resources Board
Colorado River Board
San Francisco Bay Conservation and
Development Commission
Solid Waste Management Board
State Lands Commission
State Reclamation Board
State Water Resources Control Board
Regional Water Quality Control Boards
Energy Resources Conservation and
Development Commission
California Coastal Commission
California Conservation Corps
State Coastal Conservancy

THE RESOURCES AGENCY OF CALIFORNIA

SACRAMENTO, CALIFORNIA

AUG 19 1977

Mr. Bill Myers
Office of the Auditor General
Joint Legislative Audit Committee
925 L. Street, Suite 750
Sacramento, California 95814

Dear Mr. Myers:

Thank you for forwarding to the Secretary, Letter Report
716.2.

We concur in the findings of the report, and reiterate
the Resources Agency's intention to redirect the borrowed
exempt position to the Department of Parks and Recreation
if AB 1080 (Calvo) is enacted.

Sincerely,

A handwritten signature in cursive script that reads "Richard E. Hammond".

Richard E. Hammond
Deputy Secretary for Resources

OWEN K. KUNS
RAY H. WHITAKER
CHIEF DEPUTIES

STANLEY M. LOURIMORE
EDWARD F. NOWAK
EDWARD K. PURCELL

KENT L. DECHAMBEAU
HARVEY J. FOSTER
ERNEST H. KUNZI
SHERWIN C. MACKENZIE, JR.
ANN M. MACKEY
TRACY O. POWELL, II
RUSSELL L. SPARLING
PRINCIPAL DEPUTIES

3021 STATE CAPITOL
SACRAMENTO 95814
(916) 445-3057

8011 STATE BUILDING
107 SOUTH BROADWAY
LOS ANGELES 90012
(213) 620-2550

APPENDIX A

Legislative Counsel of California

BION M. GREGORY

Sacramento, California
July 28, 1977

GERALD ROSS ADAMS
DAVID D. ALVES
MARTIN L. ANDERSON
PAUL ANTILLA
JEFFREY D. ARTHUR
CHARLES C. ASBILL
JAMES L. ASHFORD
JERRY L. BASSETT
JOHN CORZINE
BEN E. DALE
CLINTON J. DEWITT
C. DAVID DICKERSON
FRANCES S. DORBIN
ROBERT CULLEN DUFFY
CARL ELDER
LAWRENCE H. FEIN
JOHN FOSSETTE
CLAY FULLER
ALVIN D. GRESS
ROBERT D. GRONKE
JAMES W. HEINZER
THOMAS R. HEUER
EILEEN K. JENKINS
MICHAEL J. KERSTEN
L. DOUGLAS KINNEY
VICTOR KOZIELSKI
DANIEL LOUIS
JAMES A. MARSALA
DAVID R. MEEKER
PETER F. MELNICOE
ROBERT G. MILLER
JOHN A. MOGER
DWIGHT L. MOORE
VERNE L. OLIVER
EUGENE L. PAINE
MARGUERITE ROTH
MARY SHAW
WILLIAM K. STARK
JOHN T. STUDEBAKER
BRIAN L. WALKUP
DANIEL A. WEITZMAN
THOMAS D. WHELAN
JIMMIE WING
CHRISTOPHER ZIRKLE
DEPUTIES

Honorable Mike Cullen
Assembly Chamber

Department of Parks and Recreation:
Exempt Positions - #10498

Dear Mr. Cullen:

QUESTION

May the chief deputy director of the Department of Parks and Recreation appointed by the Governor, the exempt appointee of the chief deputy, and an exempt appointee of the State Parks and Recreation Commission be assigned to the Secretary of the Resources Agency?

OPINION

The chief deputy of the Department of Parks and Recreation appointed by the Governor and the exempt appointee of the chief deputy may not be assigned to the Secretary of the Resources Agency. Such positions may, however, be directed to report directly to the Secretary of the Resources Agency. There is no authority for an exempt appointment by the State Parks and Recreation Commission.

ANALYSIS

Section 4 of Article VII of the California Constitution provides for a series of exemptions from civil service for specified officers and employees, as follows:

"SEC. 4. The following are exempt from civil service:

* * *

"(e) A deputy or employee selected by each board or commission either appointed by the Governor or authorized by statute.

"(f) State officers directly appointed by the Governor with or without the consent or confirmation of the Senate and the employees of the Governor's office, and the employees of the Lieutenant Governor's office directly appointed or employed by the Lieutenant Governor.

"(g) A deputy or employee selected by each officer, except members of boards and commissions, exempted under Section 4(f).

* * *"

As we understand the question, we are concerned with three separate positions.

(1) A deputy or employee selected by the State Parks and Recreation Commission created by Section 530 of the Public Resources Code, and exempt under subdivision (e) of Section 4.

(2) The position of Chief Deputy Director, Department of Parks and Recreation appointed by the Governor and exempt from civil service under subdivision (f) of Section 4.

(3) A deputy or employee selected by the Chief Deputy Director referred to above, exempt from civil service under subdivision (g) of Section 4.¹

Initially, in respect to an exempt position for the State Parks and Recreation Commission, it should be noted that Article VII does not purport to authorize appointments, but rather operates to make exempt certain appointments otherwise authorized.

¹ We note the exempt employee is required to be a secretary holding a position confidential to the chief deputy (Sec. 11202, Gov. C.).

As we see it, this constitutional provision should be construed in conjunction with those vesting the legislative power of the state in the Legislature (see Sec. 1, Art. IV, Cal. Const.), and others particularly charging the Legislature with specified powers and responsibilities, such as the provisions specifying that money may be drawn from the State Treasury only through an appropriation made by law (Sec. 7, Art. XVI, Cal. Const.).

There is no provision of law which purports to authorize the commission to appoint anyone. To the contrary, Section 534.5 of the Public Resources Code provides that the Director of Parks and Recreation is the secretary of the commission and shall appoint such assistants from among the employees of the department, as are necessary to carry out that function.

Therefore, in the absence of any authority to appoint personnel, we are of the opinion the State Parks and Recreation Commission is not entitled to appoint a person exempt from civil service.

With regard to the position of chief deputy appointed under Section 11200 of the Government Code, it is clear that position is authorized to appoint personnel as the director of the department is so authorized (Sec. 506, P.R.C.) and the chief deputy, as a deputy is authorized to perform the same acts as the director (Sec. 7, Gov. C.). Accordingly, we are of the opinion the chief deputy appointed pursuant to Section 11200 of the Government Code is authorized to appoint one deputy or assistant exempt from civil service.

Proceeding to the question under consideration, we are concerned with whether the chief deputy appointed pursuant to Section 11200 or the deputy or assistant exempt from civil service under subdivision (g) of Section 4 may be utilized outside of the Department of Parks and Recreation in the Resources Agency.

In this regard, we think it clear that the right of an officer appointed by the Governor and having the power to employ personnel to designate a deputy or employee as exempt from civil service is inherent in the office and cannot be transferred by the incumbent to another office or agency. To do so would be to attempt to divest himself of a power conferred by law and, to that extent, repeal that law (see Thompson v. Board of Trustees of City of Alameda, 144 Cal. 281, 283; In re Collie, 38 Cal. 2d 396, 398; Mitchell v. Walker, 140 Cal. App. 2d 239, 244).

Although the chief deputy could not transfer such position to another officer or agency, this is not to say that the chief deputy could not exercise reasonable executive control over the person holding that position. In this respect, we think that the chief deputy could require such person to report, either directly or indirectly, to the chief deputy's superiors within the Resources Agency. Such reasonable executive control, however, would not, in our opinion, permit the assignment of such person to another agency or any officer in another agency.

Such conclusion is also applicable to the chief deputy in that the chief deputy is to have such duties as assigned to him by the director (Sec. 11201, Gov. C.) and there is nothing to preclude the director from directing the chief deputy to report directly to the Secretary of the Resources Agency.

Accordingly, we are of the opinion that while the chief deputy and the exempt position for the chief deputy cannot be assigned directly to the Resources Agency, those positions may be directed to report directly to the Secretary of Resources.² Finally, since we are of the opinion that there is no authority for the State Parks and Recreation Commission to make an exempt appointment, any discussion of the assignment of such employee is irrelevant.

Very truly yours,

Bion M. Gregory
Legislative Counsel



By
Jerry L. Bassett
Deputy Legislative Counsel

JLB:pam

² Since it does not appear to be at issue we have not considered the possibility of interagency agreements and their application to the question presented (see Sec. 11253, Gov. C.).

A SUMMARY OF EXEMPT POSITIONS
AUTHORIZED FOR THE DEPARTMENT
OR PARKS AND RECREATION

	<u>Authorization</u>	
	<u>Statutory</u>	<u>Constitution a/</u>
Director	Resources Code 501	Article VII 4(f)
Deputy Director - Resource Management	Resources Code 501	Article VII 4(g)
Chief Deputy Director - Administrative Liaison	Resources Code 507	Article VII 4(f)
Assistant Deputy Director - Administrative Services	Resources Code 507	Article VII 4(g)
Chief Deputy Director - General Manager Cal-Expo	Government Code 11200	Article VII 4(f)
Special Representative to Resources Agency	Government Code 11200	Article VII 4(g)
Assistant Deputy Director - Special Projects	Resources Code 530 <u>c/</u>	Article VII 4(e)
Special Assistant for Historical Preservation	Resources Code 5020.2	Article VII 4(e)
Contract Administrator Cal-Expo <u>b/</u>	Food and Agric Code 3324	Article VII 4(f)
Program Manager Cal-Expo <u>b/</u>	Food and Agric Code 3324	Article VII 4(g)
Marketing Manager Cal-Expo <u>b/</u>	Food and Agric Code 3302	Article VII 4(e)

a/ Article VII, Section 4 of the Constitution specifies which positions are exempt from Civil Service.
 Subsection (e) refers to an appointment by a board or commission.
 Subsection (f) refers to an appointment by the Governor.
 Subsection (g) refers to an appointment by the officer appointed under Subsection (f).

b/ Positions are not funded for 1976-77 fiscal year. These are responsibilities recommended by the Cal-Expo Evaluation Committee Report issued in March 1976.

c/ The Legislative Counsel has taken exception to the Department's authority for this position.