

LAW OFFICES OF THOMAS F. COLEMAN

CENTER FOR EDUCATION AND LEGAL ADVOCACY

1800 NORTH HIGHLAND AVENUE SUITE 106 □ LOS ANGELES, CA 90028 □ (213) 464-6666

JAY M. KOHORN, OF COUNSEL

July 5, 1980

Honorable George Deukmejian
California Attorney General
555 Capitol Mall, Suite 350
Sacramento, CA 95814

Re: Opinion No. 80-511

Dear Attorney General:

This week your office officially issued Opinion No. 80-511 regarding the authority of the Governor to issue Executive Order B-54-79 which prohibited discrimination in state employment for reasons of a person's sexual preference. That opinion recognized the authority of the Governor to issue such directives.

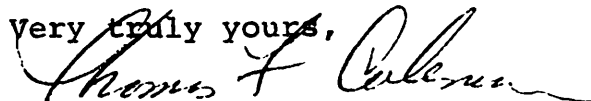
I would personally like to thank you for this opinion, especially for your decision to make it a formal opinion which will be published in the official reports. I am aware that it could have been issued as an informal unpublished opinion.

Your deputy, Mr. Anthony S. DaVigo, should be commended for his excellent research and writing and for his cooperative attitude and willingness to accept input from concerned persons.

I would also like to extend an expression of gratitude on behalf of the gay community which the Executive Order and the Opinion most directly affect.

If it should ever be possible, someday I would like to personally meet you to extend this appreciation.

Very truly yours,



THOMAS F. COLEMAN

cc: Anthony S. DaVigo
Hon. Edmund G. Brown Jr.



State of California
Department of Justice
George Deukmejian
(PRONOUNCED DUKE-MAY-GIN)
Attorney General

555 CAPITOL MALL, SUITE 350
SACRAMENTO 95814
(916) 445-9555

July 2, 1980

Thomas F. Coleman
Attorney at Law
Center for Education and
Legal Advocacy
1800 North Highland Avenue
Suite 106
Los Angeles, CA 90028

Re: Opinion No. 80-511

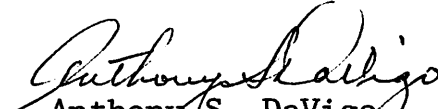
Dear Mr. Coleman:

Enclosed herewith is a copy of the above re-
ferenced opinion, dated July 3, 1980.

Thank you for your views and comments which
were carefully considered.

Very truly yours,

George Deukmejian
Attorney General


Anthony S. DaVigo
Deputy Attorney General

ASDV:elo
Enclosure

OFFICE OF THE ATTORNEY GENERAL
State of California

GEORGE DEUKMEJIAN
Attorney General

OPINION

of

GEORGE DEUKMEJIAN
Attorney General

ANTHONY S. DaVIGO
Deputy Attorney General

No. 80-511

JULY 3, 1980

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, 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, does not constitute an improper infringe-
ment 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 expand 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. 1/

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 2/ provides that

1. 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.)

2. Hereinafter, all section references are to the Government Code.

"[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.)

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 3/ (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

3. 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.)

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 or 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.

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. 4/

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.)"

4. 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).)

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.

* * * *

LAW OFFICES OF THOMAS E. COLEMAN

CENTER FOR EDUCATION AND LEGAL ADVOCACY

1800 NORTH HIGHLAND AVENUE SUITE 106 □ LOS ANGELES, CA 90028 □ (213) 464-6666

JAY M. KOHORN, OF COUNSEL

June 9, 1980

State of California
Department of Justice
Attorney General
555 Capitol Mall
Suite 350
Sacramento, California 95814

Attention: Anthony S. DaVigo, Deputy Attorney General

Re: Opinion No. 80-511

Dear Mr. DaVigo:

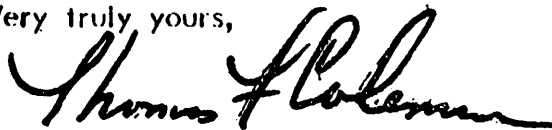
It is my understanding that on May 1, 1980, State Senator William Campbell requested the office of the Attorney General to render an opinion on the following question: does Executive Order B-54-79 constitute an improper infringement upon legislative authority with respect to the state civil service?

After having discussed this issue with you, I offered to write a short memorandum to you addressing the legal questions which arise in answering this legislator's inquiry. You were kind enough to permit me one week to draft such a memorandum and to submit it to you.

Enclosed with this letter is my memorandum, which discusses the basis and scope of the Governor's order and how it does not infringe on the legislative authority with respect to the state civil service.

I would appreciate receiving a copy of your legal opinion as soon as you send it to Senator Campbell.

Very truly yours,



Thomas E. Coleman

/mbt

Enclosure

SUBJECT: Legal basis for Executive Order B-54-79
PREPARED BY: Thomas F. Coleman, Attorney at Law
DATE: June 9, 1980

Scope of Executive Order B-54-79

On April 4, 1979, the Governor of California issued an order to the agencies, boards, departments, and commissions within the Executive Branch under the jurisdiction of the Governor.

These entities were ordered so as not to discriminate in state employment against any individual solely because of the individual's sexual preference.

Any alleged acts of discrimination in violation of this directive were to be reported to the State Personnel Board for resolution.

Legal Basis for Issuance of Executive Order

Article 5, Section 1 of the California Constitution states:

"The supreme executive power of this State is vested in the Governor. The Governor shall see that the law is faithfully executed."

Article 5, Section 4 of the California Constitution also authorizes the Governor to require executive officers and agencies and their employees to furnish information relating to their duties. Furthermore, Article V, Section 13 indicates that, subject to the power and duties of the Governor, the Attorney General is the chief law officer of the State. The Governor may direct the Attorney General to assist local prosecutors in the discharge of their duties.

Article 3, Section 3 of the California Constitution establishes a separation of powers within state government. While it is the duty of the Legislature to pass or repeal laws, it is the sole power of the Executive Branch to enforce laws. Laws, of course, include not only statutes but also provisions of the Constitution. See Spear v. Reeves (1906) 148 C. 501, 83 P. 432.

Based upon the foregoing, it appears that the Governor is the Chief Executive, Chief Law Officer, and the person primarily responsible for enforcing statutes and provisions of the Constitution.

Because of the size and complexity of the state bureaucracy, it is obvious that most executive functions may not be performed by the Governor's office, but must be handled by agencies, boards, departments, and commissions and employees thereof. It is the Governor who sets policies with respect to enforcement of laws, and it is the duty of those entities and employees within the Executive Branch, under the jurisdiction of the Governor, to follow

Legal Basis for Executive Order B-54-79
Memorandum by Thomas F. Coleman, Esq.
June 9, 1980
Page 2

the policy as established by the Governor. In addition, the Governor must supervise the performance of the duties of all executive and ministerial officers, and must apply the remedies allowed by law if they do not perform properly. See Gov. Code §12010 et seq.

An executive order is one method of transmitting such policy, in a clear and unequivocal manner, from the Governor to such entities and employees under his jurisdiction. The use of executive orders for such a purpose is nothing new. For example, on July 24, 1963, the Governor, by way of an executive order, established a "Governor's Code of Fair Practices" and declared it to be "the official policy of the Executive Branch of the State of California." (A copy of that Code is attached.) The then Attorney General, in an informal opinion (Index Letter 63-86, a copy of which is attached) agreed that the Governor had the power to issue an order so long as it did not conflict with existing laws. As another example, in 1971, Governor Ronald Reagan issued Executive Order R-34-71, which affirmed this Code of Fair Practices as the official policy of the Executive Branch of the State of California. By way of a separate memorandum, Governor Reagan redefined that Code and had it distributed to agencies and departments for implementation. (A copy of that Order and revised Code is also attached.)

By issuing Executive Order B-54-79, Governor Brown was merely using a mechanism used during past and present administrations to set a uniform policy within the Executive Branch, thus taking appropriate steps to insure that the law is being enforced by his subordinates.

Constitutional Basis for Nondiscrimination

Article 3, Section 1 of the state constitution recognizes that the United States Constitution is the supreme law of the land. In that California is an inseparable part of the United States, the federal Constitution is supreme over the laws of the State of California.

Article 1, Section 24 of the California Constitution states that rights guaranteed by the California Constitution are not dependent on those guaranteed by the United States Constitution. Thus, the California Constitution may give its residents more but not fewer, and greater but not lesser rights than does the federal Constitution.

The California Supreme Court, as well as federal courts, have made it abundantly clear that arbitrary discrimination in state employment is unconstitutional. In Gay Law Students, et al., v. Pacific Telephone and Telegraph Company, et al. (1979) 156 Cal.Rptr. 14, the Supreme Court held that "[P]ast decisions of this court establish that this general principle applies to homosexuals as well as to all other members of our polity" This constitutional mandate is based upon the due process and equal protection clauses of the state and federal constitutions.

Legal Basis for Executive Order B-54-79
Memorandum by Thomas F. Coleman, Esq.
June 9, 1980
Page 3

Furthermore, in 1972, the voters of this state enacted an amendment to our Constitution which classified "privacy" as an inalienable right guaranteed to every citizen. Proponents of the proposed amendment on privacy (now Article I, Section 1) included in the state's election brochure language indicating that the right of privacy is fundamental and protects our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communion, and our freedom to associate with the people we choose. The California Supreme Court has quoted from this election brochure with approval, thus indicating that the scope of the state constitutional right of privacy is very broad indeed in protecting citizens from governmental intrusion into personal choices such as choices regarding one's style of living and with whom one will live. City of Santa Barbara v. Adamson, May 15, 1980, No. L.A. 31126. Furthermore, California courts have held that the right of privacy protects against governmental intrusion as to the circumstances of private sexual conduct between consenting adults. Baby Lasher v. Kleinberg, May 12, 1980, Second District Court of Appeal, Division Two, 2 Civ. No. 57044 (certified for publication).

Therefore, discrimination by any governmental entity in matters of employment based upon the sexual preference of any individual is a violation of due process, equal protection, and privacy under both the state and federal constitutions. Protection against such discrimination in state employment is not dependent upon legislation.

Executive Order B-54-79 Implements the Constitution

The first paragraph of this Executive Order recognizes that the right to privacy must be vigorously enforced. The second paragraph is a policy statement which recognizes that sexual orientation discrimination by the government is illegal. The third paragraph establishes a policy of inclusion, that is, it is the policy of the Executive Branch to reach out to members of society to include as many talented persons in the workings of government as possible.

The Governor issued this Executive Order to implement the constitution and the decisions of the Supreme Court with respect to sexual privacy and sexual orientation. Since Article 4, Section 16 of the state constitution also requires that all laws of a general nature have uniform operation, certainly an Executive Order forbidding the Governor's subordinates from discriminating in state employment because of an individual's sexual preference, is an effective way to insure uniformity of constitutional protection throughout the Executive Branch.

Selection of State Personnel Board as Vehicle for Complaints

In his Order, the Governor stated that any alleged acts of discrimination in violation of his Order were to be directed to the State Personnel Board for resolution. This directive was included in the Order after consultation with the Personnel Board. Members of the Board wanted the Governor to direct such complaints to them.

Legal Basis for Executive Order B-54-79
Memorandum by Thomas F. Coleman, Esq.
June 9, 1980
Page 4

It should be noted that the Governor has not ordered the Board to do anything. His Order of nondiscrimination is directed to entities under his jurisdiction. Since the Board is a constitutionally-created body, it is not under the jurisdiction of the Governor. It has its own independent responsibilities in the area of employment and employment discrimination. Pursuant to Article 7, Section 1 of the California Constitution, the Board must make sure that employment decisions are based on "merit." Many months ago, the Board requested an opinion of the Attorney General with respect to its duties and powers to end discrimination for reasons of sexual orientation pursuant to the Pacific Telephone case, and various provisions of the state constitution and Government Code. The Board has yet to receive an answer in the form of an opinion.

Conclusion

Whatever action may be taken by the Board or by the Legislature to end discrimination in government employment based upon sexual orientation, it is clear that the Governor, exercising his "supreme executive power," may order his subordinates and entities under his jurisdiction to not discriminate for such reasons. This power is consistent with his authority to insure that constitutional provisions and supreme court decisions are uniformly operating throughout the executive branch.

Therefore, Executive Order B-54-79 does not constitute an improper infringement upon legislative authority with respect to state civil service.

The only case in which an executive order of this nature has been challenged in court arose a few years ago in Pennsylvania. In that case, a member of the Legislature sought an injunction to stop the enforcement of an executive order issued by then Governor Milton Shapp, which order committed Shapp's administration "to work towards ending discrimination . . . solely because of . . . affectional or sexual preference." In Robinson v. Shapp (1975) 350 A.2d 464, the court dismissed the complaint on the grounds that an executive order is "a broad statement of public or political policy . . . within the sole discretion of the elected Executive" and therefore not a matter for judicial interference. On June 23, 1977, in a per curiam order, the Pennsylvania Supreme Court entered a judgment upholding the lower court's decision that the Governor had the authority to issue such an order. It should be noted that Shapp's order was issued at a time when private sexual acts between consenting adults were still criminal in Pennsylvania. Also, there were no court decisions in that state recognizing that sexual orientation discrimination was unconstitutional. It would seem that since the California courts have recognized many constitutional protections against such discrimination in this state, the California Supreme Court would be even more inclined to uphold the power of the Governor to issue such an executive order.



State of California

GOVERNOR'S OFFICE
SACRAMENTO 95814

EDMUND G. BROWN JR.
GOVERNOR

(916) 445-1915

June 12, 1980

Anthony S. DaVigo
Deputy Attorney General
Department of Justice
555 Capitol Mall, Suite 350
Sacramento, California 95814

Re: Opinion No. 80-511

Dear Mr. DaVigo:

Thank you for your letter of May 27 soliciting our comments on the question of whether the Governor's Executive Order B-54-79 "infringes" upon the Legislature's authority with respect to the civil service system.

Mindful of your extensive background and expertise in handling matters relating to the State Personnel Board, I will merely summarize our position.

As you are well aware, Article VII, Section 1(b) of the California Constitution requires that appointment and promotion in civil service positions shall be based on merit. The seminal authority in this area is thus constitutional, not statutory.

Stripping away all public policy language, the legal essence of Executive Order B-54-79 is a direction to state employees responsible to the Governor prohibiting use of a specific factor unrelated to merit, i.e., sexual preference, in civil service hiring and promotions; violations are to be reported to the State Personnel Board, the agency constitutionally mandated to enforce the civil service system (Art. VII, Sec. 3(a)).

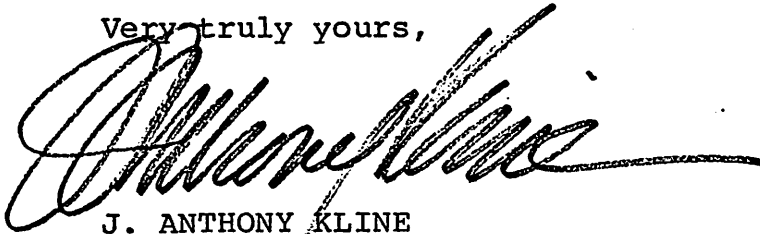
While the Legislature may of course adopt enabling statutes to implement Article VII (Gov't. Code §18500 et seq), the ultimate and controlling authority requiring merit selection is still the California Constitution. The Legislature cannot, by statute, sanction arbitrary discrimination based on factors unrelated to merit, and thus the Governor's Executive Order prohibiting

Anthony S. DaVigo
June 12, 1980
Page 2

a specified form of such discrimination does not in any manner "infringe" upon the Legislature's powers or prerogatives.

I hope these comments are of assistance, and I would welcome the opportunity to discuss the question in more detail if you desire. Thank you again for the opportunity to respond.

Very truly yours,

A handwritten signature in cursive script, appearing to read "J. Anthony Kline". The signature is written in dark ink and is positioned above the typed name.

J. ANTHONY KLINE
Legal Affairs Secretary

JAK:cjm

bcc: ✓ Tom Coleman
Don Knutson
Jerry Berg
Paul Hardman
Morris Kight
Sheldon Andelson

RECEIVED JUN 1 6 1980