

BEFORE THE FAIR POLITICAL PRACTICES COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of:)
)
Opinion requested by:)
James J. Vonk, Chief)
Counsel, State Compen-)
sation Insurance Fund)
_____)

No. 80-008
March 2, 1981

BY THE COMMISSION: We have been asked the following questions by James J. Vonk on behalf of the State Compensation Insurance Fund:

Is the State Compensation Insurance Fund (Fund), existing pursuant to Insurance Code Sections 11770, et seq., an "agency" within the meaning of Government Code Section 87300 and does the Fund make governmental "decisions" within the meaning of Government Code Sections 87100 and 87302(a)?

CONCLUSION

We conclude that the State Compensation Insurance Fund is an agency within the meaning of Section 87300 and that the Fund makes governmental decisions within the meaning of Government Code Sections 87100 and 87302(a).^{1/}

ANALYSIS

In 1911, as a result of growing concern over employment related injuries, the California Legislature passed the Roseberry Act which gave an employer the choice of assuming full responsibility for a worker's injury if the employer was negligent, or of agreeing to a limited liability regardless of fault. Stats. 1911, p. 796. Because some doubts existed about the constitutionality of such an effort, the Legislature proposed an amendment which specifically authorized it to create a system of compensation for industrial injury without

^{1/} All statutory references are to the Government Code unless otherwise stated.

regard to fault. Cal. Const. Art. 20, Sec. 21. Like the Roseberry Act, the constitutional amendment did not make participation in the workmen's compensation "system" mandatory.

It was soon apparent that not many employers had elected to come under the compensation provisions of the Roseberry Act. One of the reasons for this lack of participation was the prohibitively high cost for compensation insurance charged by the insurance companies. "A report by the Industrial Accident Board found that the average compensation rate was exactly three times the liability rate." State Compensation Insurance Fund of California: Its Purposes and Accomplishments (1976), p. 4. The Legislature responded with the Boynton Act (Stats. 1913, Chap. 176) which had two main features: (1) it did away with voluntary participation in the worker's compensation system and established employer liability without fault for all work-related injuries; and (2) it provided that employers could insure against their liability with the newly created State Compensation Insurance Fund. See State Comp. Ins. Fund v. McConnell (1956) 46 C.2d 330, 345 at fn. 2.

The Fund was to operate in open competition with private insurance carriers in order to be "a 'yardstick' for the maintenance of fair premium rates for employers and fair treatment for injured employees." State Compensation Insurance Fund: Its Purposes and Accomplishments, p. 5. It was, and is, subject to the same rules and regulations applicable to private insurance carriers, except that it is not to be administered as a profit-making enterprise; by explicit statutory command, the Fund is to be "neither more nor less than self-supporting." Insurance Code Section 11775. To this end, the Fund is directed to assess annually its loss experience and expenses and to declare a dividend or credit to each insured if, in light of a prudent regard for the health of the Fund, there exists "an excess of assets over liabilities." Insurance Code Section 11776. In keeping with its competitive nature the Fund is taxed as any other private insurer is. Revenue and Taxation Code Section 12203.

From its inception, the Fund has been self-supporting. Although originally loaned \$100,000 from the State's General Fund to cover operating costs, response to the Fund's insurance offer was so great that none of the loan was ever used and it was returned to the state with interest. 15 Ops. Cal. Atty. Gen. 210, 211. Recently, authorization for the Legislature to appropriate money for it was specifically withdrawn. Stats. 1979, Chap. 738. Historically, the Fund has been

exempted from many requirements ordinarily applicable to state agencies - for example, the "Open Meeting Law" and the "Public Records Act." Government Code Section 11770.5. See also Burum v. State Compensation Insurance Fund (1947) 30 C.2d 575, Insurance Code Section 11793 (exemption from governmental claims provision). And in 1979 the Legislature specifically provided that:

The fund shall not be subject to the provisions of the Government Code made applicable to state agencies generally or collectively with the exception of Division 4 (commencing with Section 3512) of Title 1 of, and Division 5 (commencing with Section 18000) of Title 2 of, the Government Code, unless the section specifically names the fund as an agency to which the provision applies.

Insurance Code Section 11873.

The Fund makes essentially three arguments for being considered outside the scope of the Political Reform Act's requirement that every agency adopt a Code. The first, based upon the history and purposes of the Fund and culminating in the enactment of Insurance Code Section 11873, is that the Fund is exempt from all requirements applicable to state agencies generally. The second, based upon the Political Reform Act itself, is that the Fund is not an "agency" according to criteria set out in Commission regulation 2 Cal. Adm. Code Section 18249, and in Commission opinions, Samuel Siegel, 3 FPPC Opinions 62 (No. 76-054, July 6, 1977), and Charles F. Leach 4 FPPC Opinions 48 (No. 76-092, Sept. 6, 1978). The Fund's final argument is that it does not make "decisions" within the meaning of the Conflict of Interest provisions of the Act. We shall examine each of these claims in order.

To the extent that the Fund claims that the 1979 amendment to the Insurance Code (Section 11873) exempts it from the Political Reform Act, the argument collapses of its own weight. If the Fund would have been required to adopt a Conflict of Interest Code, but for the enactment of Section 11873, that section would be an amendment to the Political Reform Act.

An amendment is "...any change of the scope or effect of an existing statute, whether by addition, omission, or substitution of its provisions...." A statute which adds to or takes away from an existing statute is considered an amendment.

Franchise Tax Board v. Cory
(1978) 80 Cal. App. 3d 772,
776. (Emphasis added.)

Section 81012(a) provides that the Political Reform Act may be amended only

...by statute, passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring and signed by the Governor, if at least 20 days prior to passage in each house the bill in its final form has been delivered to the commission for distribution to the news media and to every person who has requested the commission to send copies of such bills to him.

Since none of the procedural requirements for amending the Political Reform Act was observed in enacting Insurance Code Section 11873, it cannot operate to exclude the Fund from the scope of the Political Reform Act.

However, we do not understand the Fund to claim that it is exempt from the Political Reform Act solely by virtue of the enactment of Insurance Code Section 11873. Rather, the Fund appears to be arguing that Insurance Code Section 11873 is merely declaratory of the Fund's historic treatment as a "unique" agency which has been exempted from many of the requirements applicable to state agencies generally. According to this argument, the enactment of Insurance Code Section 11873 merely makes explicit what was already implicit in the Insurance Code. As stated, the argument avoids the difficulties inherent in treating Insurance Code Section 11873 as an amendment to the Political Reform Act.

Ordinarily, a material change in the language of a statute - which the addition of Insurance Code Section 11873 surely represents - would be construed as showing an intent on the part of the Legislature to change the meaning of the statute. 1A Sutherland Statutory Construction, Section 22.30 (4th Ed.). However, where the nature of the amendment clearly demonstrates that it was intended to be declaratory of pre-existing law, Verreos v. City and County of San Francisco (1976) 63 Cal. App. 3d 86, 99, the ordinary presumption of statutory change will not be applied. It is clear from the cases that the crucial question in determining whether Insurance Code Section 11873 is merely declaratory of existing law is whether we would have had to exclude the Fund from the Political Reform Act prior to the enactment of Section 11873. Martin v. California Mut. B. & L. Assn. (1941) 18 C.2d 478; W. R. Grace & Co. v. California Employment Commission (1944) 24 C.2d 720, Forde v. Cory (1977) 66 Cal. App. 3d 434.

In Burum v. State Compensation Insurance Fund (1947) 30 C.2d 575, the Supreme Court held that the Fund was a "unique" agency and outside the scope of the government claims act.

Sections 667 and 688 of the Political Code are general in their application to the presentation of claims against the state. The Workmen's Compensation law, the Insurance Code and the Labor Code are special statutes [which prevail over general statutes].... In line with these observations, the conclusion is inescapable that the entire framework of the Fund - its organization, its powers, its duties, and its obligations - shows that it was designed to be self-operating and of a special and unique character [and outside the requirements of the claims Act]....

Id. at 585-586.

The Burum line of analysis has been followed in a number of attorney general opinions to exclude the Fund from various code provisions. Thus, in 15 Ops. Cal Atty. Gen. 210 (1950), it was concluded that the Fund was not bound by Government Code Sections 13940-13944 and 13290 (procedures for cancelling debts).

It should be noted that all of the Government Code sections herein mentioned are general provisions which apply generally to all departments and agencies of the State. If these provisions were applied to the State Compensation Insurance Fund they would conflict with the full and complete powers given the Board of Directors of the State Fund....

* * *

The conclusions reached in this opinion are not only in line with the views expressed by the California Supreme Court in the Burum case but are also in line with the former opinions rendered by this office on the general subject. As early as February 25, 1932 this office, in Opinion No. 7949, ruled that the State Fund could purchase magazines for its waiting rooms without approval of the Department of Finance, and that the special sections of the Insurance Code covering the State Fund prevailed over the general statute, Political

Code Section 675(a) (now Government Code Sections 13370 et seq.). This Opinion was corroborated by a subsequent opinion NS-3615a dated January 23, 1941. In Opinion NS-3215, dated January 18, 1941, this office ruled that the Fund had power to enter into written property leases for its various offices irrespective of Section 675 of the Political Code, providing generally that the Director of Finance has the power to lease property upon the request of the State office concerned. In Opinion NS-2838 dated August 10, 1940, we said:

"While the State Fund is an agency of the State, from a practical standpoint its operations are quite similar to that of a privately owned stock or workmen's compensation insurer. It would not only therefore, seem proper but expedient that the business of the State Fund be conducted as a privately owned stock insurer is conducted, unhampered by those restrictions, which the State generally imposes upon those of its governmental departments and officers, the maintenance and operating costs of which are borne by tax revenues....

"As the Legislature has expressly declared the Fund shall operate on a fairly competitive basis with other privately organized insurers, it would seem to follow that it may do and perform those acts which other carriers perform and do in respect to the conservation and protection of its business, except as otherwise limited or prescribed by the laws under which it operates."

15 Ops. Cal. Atty. Gen. at 212-214.

Although it is thus plain that the Fund has been excluded from the reach of many statutes applicable to state agencies generally, it is also true that it has not been exempted from all such provisions. State Compensation Insurance Fund v. Riley (1937) 9 C.2d 126. (Civil services provisions; see also Insurance Code Section 11873.) And in each case in which the applicability of a general statute to the Fund was at issue, the question was resolved by determining whether subjecting the Fund to the provisions of the general law would disserve the purposes of the Boynton Act. In general,

of course, when a conflict between two statutes is asserted, the task of interpretation is to attempt to harmonize both of them. Fuentes v. Workers' Compensation Appeals Board (1976) 16 C.3d 1, 7. Accordingly, we will consider whether it would disserve the purposes of either the Political Reform Act or the Boynton Act to subject the Fund to the requirements of our Act.

As noted earlier, the primary purpose of the Fund is to operate competitively in the Workmen's Compensation market. Although it is true that the directors and employees of private insurance companies are not required to make public disclosure of their financial interests which might be affected by their decisions, it is not clear to us that an "insurance company" which operates under such disclosure requirements is thereby at a competitive disadvantage. When given the opportunity to demonstrate how disclosure would affect the Fund's ability to compete with private insurance carriers, the Fund simply took the position that any difference between it and a private company puts it at a competitive disadvantage. In our view, the argument proves too much for the Fund is treated differently from private insurance companies by the Insurance Code - see, e.g., the requirement that all public or quasi-public entities insure with the Fund, Insurance Code Section 11870 - and such differences as exist are obviously consistent with ^{2/}the overall statutory purpose that the Fund be competitive.

On the other hand, to the extent that the officers and employees of the Fund can affect their financial interests by virtue of their official position, it is consistent with the Political Reform Act to require disclosure of such interests as may be affected and, in appropriate cases, disqualification of the officials whose interests will be affected. Practical considerations reinforce this view. Currently, the Fund has approximately 67% of its monies available for investment or deposit in banks (10.55%), certificates of deposit (17.27%), commercial paper (24.13%), banker's acceptances (6.66%) and re-purchase agreements (7.62%). To take just a single example from the Fund's investment activities, the potential for a conflict of interest in choosing the institution or institutions

^{2/} The Fund also makes the related claim that if the price of service with the Fund were disclosure, it would be hampered in its ability to obtain directors for the Fund. Yet, the Insurance Code itself imposes restrictions on who may serve as a director, Insurance Code Section 11770, and these restrictions have obviously not put the Fund at a competitive disadvantage.

from which the Fund will purchase its certificates of deposit is readily apparent. Moreover, since the Fund is otherwise exempt from provisions of the Government Code, including those related to purchasing (see Section 14780), the potential for conflict exists with respect to the day-to-day operations of the Fund. Because there is no necessary inconsistency between the provisions of the Boynton Act and the Political Reform Act, we conclude that without the enactment of Insurance Code Section 11873, the Fund would have been subject to the Political Reform Act. Insurance Code Section 11873, therefore, is an invalid amendment to the Political Reform Act and is not merely declaratory of existing law.

This does not end our inquiry. The Fund further contends that even if its exemption from the Political Reform Act is not established by the terms of the Insurance Code, according to Fair Political Practices Commission regulations and criteria for determining whether an agency is subject to the Act, the Fund is not an "agency" within the meaning of Section 87300. The regulation and criteria referred to are those set out in 2 Cal. Adm. Code Section 18249 and in the opinions requested by Charles F. Leach, 4 FPPC Opinions 48 (No. 76-092, Sept. 6, 1978) and Samuel Siegel, 3 FPPC Opinions 62 (No. 76-054, July 6, 1977). The Commission has never considered 2 Cal. Adm. Code Section 18249 as applicable to determining whether an entity is an "agency" for the purposes of adopting a Conflict of Interest Code under the Act. Instead, transcripts of the Commission's adoption of 2 Cal. Adm. Code Section 18249 show that it was intended to define the term "state agency" only as it is used in Chapter 6 of the Act, dealing with lobbyists. Transcripts of the Commission's meeting of August 20, 1975.^{3/}

^{3/} If its application were crucial to determining whether the State Fund is covered by Chapter 7, the only question would be whether the State Fund "is financed in part by any state funds or is subject to appropriation in the state budget." 2 Cal. Adm. Code Section 18249(c). All the other criteria for a "state agency" are clearly met by the Fund. The application of the "state funding" standard to the State Fund could indeed be problematic. The Commission's deliberations concerning subsection (c) indicate that it was intended to cover any funds which flow through the State Treasury and any funds which are raised pursuant to state authority, such as agricultural and industry assessments, in addition to regular state appropriations. See Transcript, supra, at p. 56 ff. Although the State Fund is empowered to establish a fund in the State Treasury, monies deposited by it in such a fund are explicitly excluded from the general Government Code provisions applying to state monies, Insurance Code Section 11800.1, and the specific statutory provision for an appropriation of funds to the State Fund has been repealed and replaced by a general statement that the Fund should be organized as a "public enterprise fund." Insurance Code Section 11772.

In Siegel and Leach we did isolate a number of specific criteria which we thought helpful to determine whether ostensibly private entities were truly public in nature.^{4/}

These criteria, however, were not intended to be viewed as constituting a litmus test for determining whether an entity is public for purposes of the Political Reform Act. Indeed, it seems to us that criteria necessary to determine when private entities become so suffused with attributes of sovereignty as to be considered public in nature, are simply not necessary to determine whether an entity specifically authorized by the state constitution is a public agency. In the case of the Fund, we believe its constitutional provenance makes it absolutely plain that the Fund is public in nature. As we have noted, the Fund is at the heart of the Workmen's Compensation system in California; without it, the no-fault liability which the Legislature sought to establish as a matter of principle foundered in practice.

[T]he system or scheme involved in the Compensation, Insurance and Safety Act constitutes and was intended to constitute a governmental mandatory or agency to which the legislature committed the administration of certain of the state's sovereign powers; ...in other words, the State Compensation Insurance Fund is an agency of the state and was established for the purpose of administering certain portions of the sovereignty of the state.

Rauschan v. State Compensation
Insurance Fund (1927) 80 Cal.
App. 754, 760, overruled on
other grounds. People v. Superior
Court (1947) 29 C.2d 754.

^{4/} These criteria were:

- (1) Whether the impetus for formation of the [entity] originated with a government agency;
- (2) Whether [the entity] is substantially funded by, or its primary source of funds is, a government agency;
- (3) Whether one of the principal purposes for which it is formed is to provide services or undertake obligations which public agencies are legally authorized to perform and which, in fact, they have traditionally performed; and
- (4) Whether [the entity] is treated as a public entity by other statutory provisions.

Nevertheless, the Fund argues that, even if it is a state agency, it does not perform governmental functions, but rather purely business or proprietary ones, and that, as a result, it does not make governmental, but only proprietary, decisions. But the Fund does not only offer insurance as private insurance companies do; operating in the insurance market place, it performs various regulatory functions, including that of keeping insurance rates down. Its insurance business is thus subordinate to its overriding public purposes. The Fund itself describes its mission in exactly this way:

While from its first days the State Fund has stood on its own feet as a competitive enterprise, its success has never been an end in itself. The State Fund's competitive success has been, and remains today, the means for realizing the social and economic policies for which the electorate and the Legislature created the Fund. Briefly stated, these policies are:

To make certain that employers are able to insure their compulsory liability at the minimum cost consistent with the payment of appropriate benefits and the maintenance of adequate reserves;

To serve as a model for prompt fair and humane adjustment of the claims of injured workers and their dependents;

To establish the highest standards of occupational safety and health in places of employment;

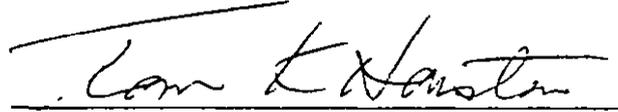
To exert through competition a healthful influence on premium rates and insurance costs that could otherwise increase excessively.

State Compensation Insurance
Fund of California: Its Purposes
and Accomplishments, p. 8.

We believe that so long as the Fund's operation creates the opportunity for conflicts of interest, the Commission has an obligation to insure that its officers and employees "should perform their duties in an impartial manner, free from bias caused by their own financial interests...." Section 81001(a). Accordingly, we believe (1) that the Fund

is an agency within the meaning of Section 87300, and (2) that it makes governmental decisions within the meaning of the Act. Sections 87100 and 87302(a).

Approved by the Commission on March 2, 1981.
Concurring: Gupta, Houston, McAndrews, Metzger and Wade.



Tom K. Houston
Chairman