

primarily on the Board's decision in Unit Determination for the State of California (1981) PERB Decision No. 110d-S. In the original unit determination, the parties were unable to agree upon a clear definition of "civil service employee" because, although they had researched the question at length, there were so many exceptions that the term evaded a clear definition. The evidence put forth by the parties was testimony regarding indicia of a civil service employee or, conversely, a non-civil service employee. On this basis, certain employees were found not to be covered under the Dills Act because they did not have the proper indicia of civil service employee status.

In the present petitions, California Union of Safety Employees (CAUSE) has raised an argument which has not been previously considered. CAUSE argues that PERB Decision No. 110d-S, upon which DPA relies, was an unconstitutional

otherwise stated.

"State employee" is defined in section 3513(c) as:

. . . any civil service employee of the state, and the teaching staff of schools under the jurisdiction of the Department of Education or the Superintendent of Public Instruction, except managerial employees, confidential employees, employees of the Department of Personnel Administration, professional employees of the Department of Finance engaged in technical or analytical state budget preparation other than the auditing staff, employees of the Legislative Counsel Bureau, employees of the board, conciliators employed by the State Conciliation Service within the Department of Industrial Relations, and intermittent athletic inspectors who are employees of the State Athletic Commission.

interpretation of the Act. Article VII section 1(a) of the California Constitution states: "Civil service includes every officer and employee of the state except as otherwise provided in this Constitution." Article VII section 4 goes on to list exemptions from civil service.²

²Section 4 of the California Constitution states:

The following are exempt from civil service:

(a) Officers and employees appointed or employed by the Legislature, either house, or legislative committees.

(b) Officers and employees appointed or employed by councils, commissions or public corporations in the judicial branch or by a court of record or officer thereof.

(c) Officers elected by the people and a deputy and an employee selected by each elected officer.

(d) Members of boards and commissions.

(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).

(h) Officers and employees of the University of California and the California State Colleges.

(i) The teaching staff of schools under the jurisdiction of the Department of Education

On December 1, 1988, the Board itself, pursuant to PERB Regulation 32215,³ requested that the parties submit written argument on the question of how section 3513(c) should be interpreted, given the language of Article VII, sections 1(a) and 4 of the State Constitution, or upon what authority the constitutional provisions should be held not to be controlling.

or the Superintendent of Public Instruction.

(j) Member, inmate, and patient help in state homes, charitable or correction institutions, and state facilities for mentally ill or retarded persons.

(k) Members of the militia while engaged in military service.

(l) Officers and employees of district agricultural associations employed less than 6 months in a calendar year.

(m) In addition to positions exempted by other provisions of this section, the Attorney General may appoint or employ six deputies or employees, the Public Utilities Commission may appoint or employ one deputy or employee, and the Legislative Counsel may appoint or employ two deputies or employees.

³PERB Regulations are codified at California Administrative Code, title 8, section 31001 et seq.

Regulation 32215 states:

A Board agent shall issue a written proposed decision or submit the record of the case to the Board itself for decision pursuant to instructions from the Board itself. The Board shall serve the proposed decision on each party. Unless expressly adopted by the Board itself, a proposed or final Board agent decision, including supporting rationale, shall be without precedent for future cases.

(State of California (Department of Personnel Administration)

(1988) PERB Order No. Ad-176-S.)

POSITION OF
CALIFORNIA UNION OF SAFETY EMPLOYEES

CAUSE argues that PERB Decision No. 110d-S is unconstitutional and should not be relied upon. In support of this argument, CAUSE refers to former Constitutional Article XXIV, section 4, the precursor to the present Article VII. Former Article XXIV was not changed substantially, but included language under subsection (b) which gave the Legislature the power to return certain previously excepted positions to state civil service. It went on, however, to state that no exceptions could be revived as to any positions which were included in the state civil service under this subdivision. When new positions or classifications were authorized by law, they were to be included in the state civil service system unless they had previously been excepted under section 4. The exemptions currently listed under Article VII, section 4 (enacted June 8, 1976) do not specifically include the group of employees which DPA desires to exclude in this unit modification petition (seasonal lifeguards). CAUSE then points to indicia of legislative intent contained in a ballot pamphlet, contending that the pamphlet made clear that the Legislature would be prohibited from exempting any group from the merit system of employment, although most exempt classes could be included by future legislative act.

Furthermore, CAUSE contends the Legislature enacted the Dills Act with the merit principles of Article VII of the Constitution firmly in mind and fashioned the statutes specifically to avoid any conflict with the Constitution. (Pacific Legal Foundation v. Brown (1981) 29 Cal.3d 168.) The Constitution and the Dills Act are not in conflict, but rather should be interpreted harmoniously, as each carries out and looks toward a different purpose. The Constitution is the controlling authority, and judicial decision cannot supersede that authority. Therefore, even if there was conflict, the Constitution would nonetheless control. Because the administrative decision in PERB Decision No. 110d-S is clearly repugnant to the Constitution, it is CAUSE'S position that it cannot stand. (Wright v. Compton Unified School District (1975) 46 Cal.App.3d 177, at p. 184 and Noce v. Department of Finance (1941) 45 Cal.App.2d 5, at p. 10.)

POSITION OF
CALIFORNIA STATE EMPLOYEES' ASSOCIATION (CSEA)

CSEA contends that PERB Decision No. 110d-S was incorrect because it held that, although certain employees were not in the constitutionally exempt classes, they were not "civil service" employees. CSEA argues that a plain reading of the Constitution and related case law shows that the Board incorrectly interpreted, and added to, the statutorily limited number of specified exempt classes. Since the constitutional definition of civil service is binding upon PERB when defining civil service under the Dills Act, and because a statute must be construed as

consistent with constitutional provisions whenever possible, CSEA asserts that the Board erred in Decision No. 110d-S.

Citing Fulton v. Brannan (1891) 88 Cal.2d 454, CSEA posits that, when the Legislature enacted Government Code section 3513(c) defining a state employee, it did so bearing in mind the constitutional classifications and the definitions of civil service and exempt state employees. Even if that presumption did not apply, it is argued, section 3513(c) adopts some of the exact language used in the constitutional provisions on exempt employees, adding them to the covered group of employees. (See Article VII, section 4(i) where it is stated that among the exempt employees are "the teaching staff of schools under the jurisdiction of the State Department of Education or the Superintendent of Public Instruction.") The use of such constitutional language by the drafters of the Dills Act show that the Legislature was aware of the constitutional definition of civil service when it enacted the statute.

Furthermore, CSEA contends that the constitutional definition of civil service must be read broadly and therefore encompasses seasonal and intermittent employees such as the lifeguards which are the subject of these petitions. (See Stockburger v. Riley (1937) 21 Cal.App.2d 165 and State Compensation Insurance Fund v. Riley (1937) 9 Cal.2d 126.) Additionally, Government Code section 19100 presumes that seasonal and intermittent employees have the right to bargain

collectively because it refers to a memorandum of understanding having been reached pursuant to section 3517.5 of the Dills Act.

Based upon the above, CSEA contends that PERB Decision No. 110d-S should be overruled and, further, that it was erroneous because administrative practices are not the criteria which determine whether an individual is a civil service employee.

(See California State Employees Association v. Trustees of California State Colleges (1965) 237 Cal.App.2d 530.)

POSITION OF
DEPARTMENT OF PERSONNEL ADMINISTRATION

DPA contends that the Constitution should be read as a whole to interpret legislative intent. (Lungren v. George DEUKMEJIAN, et al. (1988) 45 Cal.3d 727.) DPA argues that the clear legislative intent of Article VII of the Constitution was to put into place the merit system and eradicate the spoils system of government. The merit system was placed at the center of the civil service system, and entrance into the system was prohibited without competitive examination. DPA claims that because seasonal positions such as lifeguards do not compete in an examination, and are not promoted by examination and tenure, they are not a part of civil service under the meaning of the Constitution and are, therefore, not employees covered under the Dills Act.

DPA argues that the Civil Service Act, Government Code section 18500 et seq., does not cover all employees in the same way. Civil service is defined in neither the Constitution nor the Government Code and, therefore, to say that the

constitutional definition of civil service employee is binding upon PERB is not accurate. DPA claims that Article VII, sections 1 and 4 of the Constitution do not adequately define all civil service employees and that, in fact, one can be a state employee and not be a civil service employee, although he or she is not specifically exempt. (California State Employees Association v. Williams (1970) 7 Cal.App.3d 390.)

In addition, the point is raised that the Constitution predates the collective bargaining process in state employment and that therefore it is very difficult to read the intention of the Constitution in the setting of collective bargaining. In support of this argument, DPA states that the case of State Compensation Insurance Fund v. Riley, supra, has never been overturned, but that the court in 1937 was faced with a much simpler governmental system than exists today. (California State Employees Association v. Williams, supra, at p. 396, fn. 3.)

DISCUSSION

The issue before the Board is the proper interpretation of Dills Act section 3513(c) in light of the constitutional provisions regarding civil service. The important question is which employees are covered under the Dills Act and which employees will not be covered because they are considered not to be "civil service" employees. As noted above, the Dills Act defines employees to be "any civil service employee of the state" (Section 3513(c).) Article VII of the California Constitution, section 1, tells us that "the civil service

includes every officer and employee of the state except as provided in this Constitution." Article VII, section 4 then goes on to list a number of exempt positions, which do not include the position at issue here.

A statute is to be interpreted in such a way as to preserve its constitutionality. (California Housing Finance Agency v. Elliot (1976) 17 Cal.3d 575; see, generally, 76 Am.Jur.2d, Constitutional Law, sec. 144 et seq.; Witkin, Summary of California Law, 8th Ed., Constitutional Law, sec. 69.) A legislative act is presumed to be constitutional; therefore, if a statute can be interpreted in a way that is within the parameters of the Constitution, that is the interpretation which must be chosen. (In re Madera Irrigation Dist. (1891) 92 Cal. 296 at p. 307; see, generally, 16 Am.Jur.2d, Constitutional Law, sec. 137 et seq.; Witkin, Summary of California Law, 8th Ed., Constitutional Law, sec. 43.) In California State Employees' Association v. State of California (1988) 199 Cal.App.3d 840, at page 845, the California Supreme Court, quoting from Methodist Hospital of Sacramento v. Saylor (1971) 5 Cal.3d 685, 691, stated:

. . . the California Constitution is a limitation or restriction on the powers of the Legislature. Two important consequences flow from this fact. First, the entire law-making authority of the state, except the people's right of initiative and referendum, is vested in the Legislature, and that body may exercise any and all legislative powers which are not expressly or by necessary implication denied to it by the Constitution . . . Secondly, all intendments favor the exercise of the Legislature's plenary

authority: "If there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action. . . ."

A statute is to be interpreted following its plain meaning, i.e., the meaning that a layperson or a dictionary definition would provide. (Shay v. Roth (1923) 64 Cal.App. 314 at p. 316; see, generally, Witkin, Summary of California Law, supra, section 68.) Article VII, sections 1 and 4 of the Constitution, when interpreted according to their plain meaning, state that all employees of the state are members of the civil service system unless they are exempt under section 4. The list of exemptions under section 4 do not include the positions at issue herein. If the Dills Act is to be read to preserve its constitutionality, the reference to civil service employees in section 3513(c) must follow the constitutional definition of civil service employees. Therefore, all employees in state service, unless specifically exempted by section 4 of Article VII of the Constitution, are covered under the Dills Act.

Further, we are convinced that the Legislature specifically intended that the Article VII definition of "civil service" be used in interpreting section 3513(c) of the Dills Act.

The Dills Act was enacted with the merit principles defined in the Constitution clearly in mind. Section 3512 of the Dills Act states:

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Nothing in this chapter shall be construed to contravene the spirit or intent of the merit principle in state employment, nor to limit

the entitlements of state civil service employees

The California Supreme Court, in considering the constitutionality of the Dills Act in the face of the merit system, has held:

. . . the Legislature drafted SEERA with the merit principle of article VII firmly in mind, fashioning the statute specifically to avoid any conflict with that constitutional mandate.

(Pacific Legal Foundation v. Brown, *supra*, 29 Cal.3d 168, at 186.)

The Court continued,

. . . we find no conflict between the general collective bargaining process authorized by SEERA and the merit principle of civil service employment guaranteed by the California Constitution. . . .
(Ibid.)

Perspective is an important part of this process because although the statute and the Constitution must be read together and reconciled, each statutory scheme has its own purpose, and we must look to the purpose or the end intended. The question which we deal with in this case is not a question of benefits, wages and hours, or seniority under the civil service system. Rather, it is a question of coverage under the Dills Act. It is clear that the framers of the Dills Act intended a broad cross section of state employees to be covered. As long as the application of section 3513(c) does not run counter to the constitutional provisions regarding civil service, there is no conflict. Including the classifications at issue within the coverage of the Dills Act does not conflict with the constitutionally mandated

merit system. Furthermore, any conflict which might arise could be worked out on a case-by-case basis

. . . either by administrative accommodation between . . . agencies themselves or, failing that, by sensitive application of evolving judicial principles. . . .
(Pacific Legal Foundation v. Brown, supra, at p. 200.)

The day-to-day workings of state employment support the analysis discussed above regarding which employees of the state are civil service employees and which are not. The State of California "purchases" the services of individuals in one of two ways: (1) contracting for needed services, special skills and/or background; and (2) hiring an individual as an employee. In none of the petitions before the Board is there a contract between the individual and the state. Rather, the individual is placed on the state payroll, in a state civil service classification with a classification code number. The individual may contribute to the retirement system, may be eligible for a variety of employee benefits, is subject to state discipline, and has a variety of employee rights. Therefore, all of the individuals in the contested classifications are state employees.

The next step is to determine whether these employees are civil service employees within the meaning of the Constitution and the Dills Act. The Constitution, at all times, has only authorized two methods for the appointment of state employees. The first concerns exempt appointments. As all parties have noted, exempt appointments are specifically designated by the

Constitution (Art. VII, sec. 4) or by special legislation.⁴ All personnel appointments other than the specific exempt appointments are therefore part of the civil service system and have some form of civil service status, whether it be seasonal, limited term, permanent, part-time, or any other type.

All of the contested positions are designated with a state-created civil service classification and a state class code, and the salaries are determined by DPA. Exempt classes and pay scales are established by the Department of Finance. All of the contested classes are controlled by DPA and the State Personnel Board.

The legal authority for all of the contested classifications is embodied in Government Code section 19058⁵ of the Civil

⁴The exception to this is the prevailing wage laws (Labor Code section 16000 et seq.) regarding public construction contracts.

⁵Government Code section 19058 states:

When there is no employment list from which a position may be filled, the appointing power, with the consent of the board, may fill the position by temporary appointment. The temporary appointment to a permanent position shall continue only until eligibles are available from an appropriate employment list and shall not exceed the period prescribed by Section 5 of Article VII of the Constitution. Within the limits of the period prescribed therein, any temporary appointment to a limited term position may, in the discretion of the appointing power and with the approval of the board, be continued for the life of such position. When temporary appointments are made to permanent positions, an appropriate employment list shall be established for each class to which a temporary appointment is made before the

Service Act. Such appointments are clearly within the civil service, as such appointments are only authorized in absence of an appropriate list of eligibles.

Government Code sections 19063.2, 19063.5, 19063.6 and 19063.8 of the Civil Service Act were enacted and became effective in 1983. In each section, the Legislature clearly recognized the existence of open seasonal class positions in the civil service system. These appointments specifically do not require the examination process to achieve appointment eligibility, which is contrary to DPA's assertion that non-testing appointments are not civil service appointments.

It is clear from the above that state employees must be either exempt or civil service. The employees in question are not exempt as defined in the Constitution and must, therefore, be civil service employees.

ORDER

Based upon all of the above, we find that seasonal lifeguards are covered under the Dills Act, and that the method of decision utilized in PERB Decision No. 110d-S was not in accord with Article VII, sections 1 and 4 of the Constitution. Therefore, PERB Decision No. 110d-S may not be relied upon for the proposition that an employee covered under the Dills Act is solely one whose position carries the indicia of "civil service" status presented in the testimony provided in PERB Decision

expiration of the appointment.

No. 110d-S. To the extent that PERB Decision No. 110d-S is inconsistent with this Decision, it is hereby OVERRULED. The unit modification petitions filed by the State Department of Personnel Administration are hereby DISMISSED, and the case is hereby REMANDED to the PERB Sacramento Regional Director.

Members Craib and Shank joined in this Decision.

Chairperson Hesse's concurrence begins on page 17.

Hesse, Chairperson, concurring: While I agree with the majority's conclusion that the employees in question, seasonal lifeguards, are civil service employees, I write separately to harmonize the conflict between Article VII, section 4 of the California Constitution and the merit principles inherent in the civil service system.

As noted by the majority, Article VII, section 1(a) of the California Constitution mandates that "[t]he civil service includes every officer and employee of the state except as otherwise provided in this Constitution." This mandate is qualified by Article VII, section 4, which specifically enumerates the exemptions from civil service. Courts are without power to create additional exemptions. (State Compensation Insurance Fund v. Riley (1937) 9 Cal.2d 126, 134.) This rule equally applies to administrative agencies. Since seasonal lifeguards are not listed as one of the exemptions to civil service, the majority concludes that seasonal lifeguards must be civil service employees. However, the majority fails to adequately address the fact that seasonal lifeguards are not subject to the competitive examination process of the civil service system.

In reconciling the constitutional mandate of Article VII and the merit system of state civil service, Article VII, section 1(b) is instructive. Specifically, Article VII, section 1(b) states:

In the civil service permanent appointment and promotion shall be made under a general

system based on merit ascertained by competitive examination.
(Emphasis added.)

Former-Article XXIV of the California Constitution,¹ which established the merit system of state civil service, was adopted in 1934. As the Court of Appeal stated in California State Employees Association v. Williams (1970) 7 Cal.App.3d 390, 398:

Article XXIV was presented to California voters in 1934 as a means of establishing a merit system of employment which would eliminate the spoils system. [Citation.] It was not presented as an organic blueprint for the structure of agencies within the states executive branch.

At that time, the state government was a relatively simple structure. In adopting a civil service system for permanent appointment and promotion, nonpermanent positions, such as seasonal lifeguards, were not within the contemplation of the civil service system. However, in the ensuing years, a multitude of new public services, which established new positions, were created. Generally, courts do not construe constitutional provisions "so as to prevent legislative action adjusted to growing needs and the changed condition of the people." (Pacific Legal Foundation v. Brown (1981) 29 Cal.3d 168, 196, citing Veterans' Welfare Board v. Jordan (1922) 189 Cal. 124, 143.) In construing the language of Article VII, one must consider the expansion and complexity of state government and the civil service system.

¹Article XXIV of the Constitution was amended and later repealed. In 1976, Article VII was added, which was substantially identical to former-Article XXIV.

Under Article VII, section 1(b), the issue then becomes whether seasonal lifeguards are "permanent." If such positions are permanent, then, under the mandatory language of Article VII, section 1(b) of the Constitution, permanent appointments and promotions must be based on merit, i.e., competitive examination. Under Article VII, section 1(b), there is no mention of nonpermanent appointments and promotions. Rather, the Constitution is silent regarding nonpermanent appointments and promotions. Consequently, if such positions are not permanent, then it is not mandatory that such appointments or promotions are subject to competitive examination to ascertain merit.

In the present case, seasonal lifeguards are not appointed or promoted based on a competitive examination. In its brief, the Department of Personnel Administration argues that the seasonal lifeguard positions do not compete in examinations, are not promoted by examination and tenure, and do not have the same benefits as civil service employees. In the California Union of Safety Employees' (CAUSE) brief, CAUSE argues that the seasonal lifeguards under attack in this unit modification petition are subjected to a physical condition test. Neither party asserts that the seasonal lifeguard positions are subjected to a civil service competitive examination.

In attempting to define seasonal employee, I am frustrated by the lack of a definition in either the California Constitution or Government Code. While the Government Code explicitly defines permanent employee (Gov. Code, sec. 18528), temporary employee

(Gov. Code, sec. 18529), limited-term employee (Gov. Code, sec. 18530), emergency employee (Gov. Code, sec. 18531), full-time position (Gov. Code, sec. 18550), part-time position (Gov. Code, sec. 18551), and intermittent position (Gov. Code, sec. 18552), no definition exists for a seasonal employee or position. However, the term "seasonal class position" is included at Government Code sections 19063 et seq., which describe the appointment and priority consideration of public assistance recipients and the establishment of qualified hiring pools and referrals. It appears that seasonal class positions are filled pursuant to Government Code sections 19063 et seq. Government Code section 19063 infers that seasonal class positions do not require an examination. Such positions are filled by "qualified hiring pools" or "referrals of public assistance recipients."

The purpose of the California civil service system is to promote efficiency and economy in state government. (State Compensation Insurance Fund v. Riley, supra, 9 Cal.2d 126, 134.) This goal is achieved by basing appointments and promotions on merit, efficiency and fitness ascertained by competitive examination. (Id.)

Although seasonal class positions do not require a civil service competitive examination, these positions do not necessarily contradict the purposes of the civil service system. The use of merit in the appointment and promotion of civil service employees serves to abolish the so-called spoils system and, at the same time, increase the efficiency of the civil

service by assuring the employees that appointment and promotion will be the award of faithful and honest service. (Skelly v. State Personnel Board (1975) 15 Cal.3d 194, 210; Steen v. Board of Civil Service Commissioners (1945) 26 Cal.2d 716, 722.)

Assuming seasonal class positions include seasonal lifeguards, these positions are not the type of position whereby appointment and promotion through a competitive examination would necessarily increase efficiency and economy. Seasonal lifeguard positions are needed for a limited period each year and do not lend themselves to a structured or cumbersome hiring procedure. Rather, appointments are based on fluctuating need, and any promotion is virtually nonexistent as the positions may be filled by different individuals each year. There appears to be no continuing hierarchical system on which to establish appointment or promotion. By their nature, seasonal lifeguard positions do not promote the spoils system, inefficiency, or noneconomy.

By enacting Government Code section 19063 et seq., the Legislature established a separate procedure for the appointment and promotion of seasonal class positions. This procedure does not conflict with the constitutional provision establishing the civil service system or the purposes of the civil service system. As seasonal lifeguard positions are not permanent, the fact that such positions are not subject to a competitive examination does not conflict with Article VII of the California Constitution. Further, the purposes of efficiency and economy are served by the current procedure for the appointment and promotion of seasonal

lifeguard positions. Accordingly, I conclude that seasonal lifeguards are civil service employees.