

## Opinion No. 51-5388

July 19, 1951

**BY:** JOE L. MARTINEZ, Attorney General

**TO:** Honorable Robert D. Castner State Auditor Santa Fe, New Mexico

{\*78} In reply to your letter of May 2, 1951, first, you would like to know whether you, as state auditor, must promulgate and file with the State Law Librarian rules and regulations requiring a certificate of residency to be filed with your office and so notify the heads of departments, bureaus, commissions, etc., of such ruling.

I fail to find, under duties of the auditor, any specific powers given to you to promulgate rules and regulations wherein you may require a certificate of residency to be filed with your office by all departments, bureaus and commissions in order to fully comply with § 10-105 of N.M.S.A. 1941; however, § 10-106 N.M.S.A. 1941, reads as follows:

"Any person whose duty it is to engage or hire employees mentioned in section 1 (§ 10-105) of this act may require any person applying for such employment to file an affidavit with such person, stating his name and residence and that he has been a bona fide resident of the state of New Mexico for a period of one (1) year next previous to the date of application for such employment. In all prosecutions against any persons for violation of the provisions of this act (§§ 10-105 -- 10-109), such affidavits shall be received in evidence as prima facie proof of the truth of the statements therein contained."

You will notice that the above statute makes it mandatory upon any person whose duty it is to engage or hire employees to require said person applying for such employment to file an affidavit stating his name and residence and that he has been a bona fide resident of the State of New Mexico for a period of one year next previous to the date of application for such employment. This statute makes it the mandatory duty of the person employing any state employee to obtain this affidavit before hiring anybody and this applies to any department, bureau, commission, etc., of the State of New Mexico.

Section 10-108 of the 1941 Compilation reads as follows:

"Any person, firm, corporation or association having charge of or control over the employment of persons mentioned in section 1 (§ 10-105) of this act, who shall wilfully refuse to comply with the provisions of said section 1 (§ 10-105), shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than \$ 100 nor more than \$ 300 or by imprisonment in the county jail not to exceed ninety (90) days or both such fine and imprisonment, in the discretion of the court."

You will note that under the wording of the above statute, any one employing a person who has not resided in New Mexico at least one year prior to the date of his employment is guilty of a misdemeanor and punishable as hereinabove provided.

Therefore, it is my opinion that, since it is the duty of heads of departments, bureaus, commissions, etc., to require this affidavit of residence, these heads are the ones primarily responsible for obtaining these affidavits of residence and they are liable if they fail to do so.

In the event that § 10-105 has not been complied with and a warrant is then issued in compensation to an employee who has not resided in the state the required year, without your knowledge, it is my opinion that the head of the department, agency or bureau is the one who is required to take the legal steps for the recovery of such {<sup>\*79</sup>} payment. Now, if you should have any knowledge or information of any state employee not having been a resident of the State of New Mexico for one year before his acceptance of any state employment, I believe that under § 3-203 N.M.S.A., you would have the right to examine the person or persons who are not residents of this state, any witnesses and others, on oath or affirmation, touching any matter material to be known in the settlement of such account, and for that purpose you may issue subpoenas and compel witnesses to give evidence in the same manner as courts of law may do, and you are further authorized to administer all such oaths or affirmations. Under this statute you would have the power to compel the heads of departments to produce the affidavit required under § 10-106 N.M. 1941 Compilation before making payment to any person or persons employed who have not been residents of New Mexico for one year prior to their employment as state employee or employees.

You also state in your letter that §§ 3-206 and 3-207 are self explanatory and enforceable -- and, I may add that they are both mandatory.

Trusting that this fully answers your inquiries, I remain