

Opinion No. 53-5812

September 8, 1953

BY: RICHARD H. ROBINSON, Attorney General

TO: Honorable Tom Wiley Superintendent of Public Instruction Santa Fe, New Mexico

{*219} In your letter dated July 18, 1953, you state that the Director of Transportation and the Director of the Textbook Division in your Department are positions which are designated by statute and you inquire whether such positions are exempt from classification by the State Personnel Board.

Section 10-401 of the 1941 Compilation, as amended, authorizes the Governor to classify all the employees in the Executive Department of the State, including all offices, departments and institutions having due regard to the character of the work performed, the training required for performance and the importance of the service, it being the purpose of this act to provide substantially equal salaries for services of equal value.

It is to be noted that the classification is limited to employees in the Executive Department and does not apply to public officers as such, and if the two positions mentioned in your letter are public offices, then the same would be exempt from classification by the State Personnel Board.

Section 55-1703 of the 1941 Compilation creates a division known as "State Textbook Division" and provides for the appointment of the State Textbook Director, who shall have charge of said State Textbook Division and administer the same according to the provisions of this Act.

Section 55-1801 of the 1941 Compilation, authorizes the appointment of a Director of Transportation. He is required to work with the State Educational Budget Auditor in carrying out the terms of the Transportation Act, and he is given authority, with the approval of the State Board of Education, to establish standards of transportation, including the establishment of bus routes, requirements of drivers, and specifications for busses used in the transportation of pupils.

{*220} In the case entitled **State ex rel Gibson vs. Fernandez, 40 N.M. 288, 58 P. 2nd 1197** at page 292 of the New Mexico report, the Supreme Court quotes with approval the five elements indispensable in any position of public employment in order to make it a public office of a civil nature, as follows:

"(1). It must be created by the Constitution or by the Legislature or created by a municipality or other body through authority conferred by the Legislature; (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred, and the duties to be discharged, must be defined, directly or impliedly, by the Legislature or through

legislative authority; (4) the duties must be performed independently and without control of a superior power, other than the law, unless they be those of an inferior or subordinate office, created or authorized by the Legislature, and by it placed under the general control of a superior officer or body; (5) it must have some permanency and continuity, and not be only temporary or occasional."

In view of the fact that the two positions, namely that of State Textbook Director and Director of Transportation, have all of the necessary elements of a public office as above defined by the Court, it is the opinion of this office that the State Textbook Director and Director of Transportation are public officers of a civil nature and thus do not come within the provisions of the Act authorizing classification of employees of the Executive Department.