

## Opinion No. 55-6149

April 26, 1955

**BY:** RICHARD H. ROBINSON, Attorney General

**TO:** Mr. John H. Hallahan, State Personnel Officer, Santa Fe, New Mexico

In accordance with our telephone conversation of April 25, 1955, I am writing you regarding the positions in this office of assistant attorneys general. The question arose during our conversation as to whether or not said positions were subject to classification under the State Personnel Act, which reads as follows:

"5-4-1. Classification of executive department employees-Salary limitation-Personnel director. -- The governor is hereby authorized and empowered, subject to the approval of the state board of finance, to classify all **employees** in the executive department of the state. \*\*\*\*."

We have held in former opinions that the principal question to decide is whether or not persons are State employees as contrasted with State officials. The principal authority cited in our former opinions was the case of State ex rel Gibson v. Fernandez, 40 N.M. 288, 58 P. 2d 1197, in which the Supreme Court of this State distinguished between employees and officials. In so doing, it set forth the requirements for a State official 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; and
5. It must have some permanency and continuity, and not be temporary or occasional. In addition, in this state, an officer must take and file an official oath, hold a commission or other written authority, and give an official bond, if the latter be required by proper authority."

The Supreme Court went further in that case and quoted the case of Barney v. Hawkins, 79 Mont. 506, 257 P. 2d 411, in which the Supreme Court cited the position of assistant attorney general as an example of a State official.

It is therefore the opinion of this office that the position of assistant attorney general has the status of being a State official rather than an employee and thus, under the State Personnel Act, are exempt from classification and subject only to budget limitations in determining salaries to be paid.