

Opinion No. 57-137

June 12, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General Hilton A. Dickson, Jr.,
Assistant Attorney General

TO: Mrs. Blanche G. Quintana, Director, Office of Personnel, State of New Mexico,
Santa Fe, New Mexico

QUESTIONS

QUESTIONS

May a person be employed by an Area Supervisor of the Game and Fish Department who does not meet the residency requirements as provided for in § 5-1-5, N.M.S.A., 1953 Comp., upon a showing that such person is the best qualified of those having made application?

CONCLUSION

No.

OPINION

ANALYSIS

By the information summarized from the letter of transmittal and attached correspondence to your request for an opinion, it appears that a clerk-typist vacancy existed in the Roswell Area Office of the Game and Fish Department, and that, after giving appropriate consideration to numerous applications for the job, a temporary selection was made by the Area Supervisor of a person being a resident in this State since February 1957.

Considering the basic facts as aforesaid, we turn first to § 5-1-5, N.M.S.A., 1953 Comp., which provides as follows:

"Hereafter all employees of the state of New Mexico, including all political subdivisions thereof and including all of the departments, bureaus, boards, commissions and institutions in said state, and all of its political subdivisions, shall be residents of the state of New Mexico, having resided in this state for a period of at least one year prior to the commencement of their employment and it shall be the duty of every employer of labor, including the State of New Mexico and all political subdivisions thereof and including all of the departments, bureaus, boards, commissions or institutions, engaged in the construction, erection, alteration, repair or maintenance of any public work with the state of New Mexico to employ persons who have resided in the State of New

Mexico for at least one year previous to the time of employment, to the extent of ninety per centum of the total number of persons of each class of labor so employed, whenever such equally skillful resident labor is available."

The meaning and requirements as stated in the aforequoted statute are clear, and do not lend themselves to interpretation except possibly for the category of labor employed by the various political subdivisions and departments of the State in public construction, alteration, repair or maintenance. No exceptions to the residency requirement of one year are suggested for the category or classification of employment considered herein.

A further search of the laws of this State, however, reveals that persons not omitting the aforesaid residency requirement may be employed in certain job classifications and under certain provided contingencies. Specifically, Chapter 235, Section 9-C, New Mexico Session Laws of 1957, provides as follows:

"Such restrictions as to residence provided for in any law shall not apply to employees of state educational or other institutions, and state departments for positions in which professional or technical training is required for which qualified prospective employees, who are bonafide residents of the state of New Mexico, are not available, all or part of whose salary is paid from appropriations made herein; provided, however, that prior to such employment by any state officer or department whose salary payments are made through the office of the department of finance and administration, a statement be submitted to the department of finance and administration setting forth fully the facts justifying such employment of a nonresident. No appropriation made in this act for salaries shall be expended for any other purposes except upon express approval of the department of finance and administration and upon determination of the department of finance and administration that an emergency exists which necessitates the transfer of moneys from a salary account for another purpose."

From the last quoted law, state educational institutions and other state departments may fill positions which require professional or technical training upon an adequate showing that persons specifically qualified and needed for designated positions are not available or resident within the State as is otherwise required. However, it is the opinion of this office that the position of clerktypist is not such as is contemplated in the appropriation law last referred to, and accordingly where there is a failure to show the unavailability of qualified resident applicants, then consideration may not finally be given persons resident for less than the required year. A recommendation based upon a personal belief as to which individual from a number considered is the best qualified is further, in our opinion, not the criteria expressed by the basic law herein considered.